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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN RADDATZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General
Department of Justice
Washington, D. C. 20530

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-24a) is reported at 592 F.2d 976. The memorandum orders of the district court (Apps. D and E, *infra*, 29a-34a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 25a-26a) was entered on February 6, 1979, and a petition for rehearing was denied on May 4, 1979 (App. C, *infra*, 27a-28a).[1] On May 31, 1979, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 636(b)(1)(B), which allows a district court to decide a suppression motion based on the record developed before a magistrate and the magistrate's proposed findings of fact and recommendations, violates the Due Process Clause.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. 28 U.S.C. 636(b)(1) provides in pertinent part:

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[1] The court of appeals issued a corrected copy of the order denying rehearing on May 22, 1979.

> Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion * * * to suppress evidence in a criminal case * * *. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) * * *.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or

recommit the matter to the magistrate with instructions.

STATEMENT

Following a bench trial on a stipulated record in the United States District Court for the Northern District of Illinois, respondent, a previously convicted felon, was convicted of unlawfully receiving a firearm, in violation of 18 U.S.C. 922(h).[2] Respondent was sentenced to five years' imprisonment, all but six months of which was suspended in favor of four and a half years' probation (App. A, *infra*, 1a n.1).

1. Prior to trial, respondent moved to suppress several incriminating statements that he had made to agents of the Bureau of Alcohol, Tobacco and Firearms on the ground that the statements had been induced by promises of immunity in return for his cooperation. Over respondent's objection, the district court referred the suppression motion to a magistrate for an evidentiary hearing in accordance with the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B) (App. A, *infra*, 4a).

The evidence adduced at the suppression hearing showed that on August 8, 1976, two Chicago police officers arrested respondent, who was holding a pistol, for unlawful use of a weapon. Lying near respond-

[2] The parties agreed to allow the court to try respondent on the basis of the transcript of the suppression hearing, the statements of three witnesses, and the stipulations that respondent had previously been convicted of eight felonies and that the firearm in question had been manufactured in Florida (App. F, *infra*, 35a-38a).

ent at the time of the arrest was another man, Jimmy Batson, who was bleeding from the left side of his head. Although Batson claimed that he had injured himself in a fall to the curb, respondent, after being informed of his constitutional rights, admitted that he had been fighting with Batson over a family matter and that he had brought a gun with him to protect himself in case any of Batson's friends tried to intercede on Batson's behalf. In October 1976, the State of Illinois filed a charge against respondent arising out of the August 8 incident (Apps. A and F, *infra*, 2a-3a, 35a-36a; Tr. 3-21, 28-29, 155-157, 249).

One month later, on November 19, 1976, Agents Paul Russell and Richard McCulloch of the Bureau of Alcohol, Tobacco and Firearms went to respondent's home to interview him about the pistol that was in his possession at the time of his arrest. The agents knew that respondent had previously been convicted of a felony. After informing respondent of his *Miranda* rights and ascertaining that he understood those rights, the agents told respondent that the gun in question had at one time been owned by a West Virginia man who had been slain in an unsolved homicide. The agents sought to establish the gun's chain of possession since that time.[3] Respondent remarked that he had seized the pistol from Batson during the altercation on August 8 and that he

[3] In addition, one of the officers testified that they also were "trying to determine venue; where [respondent] had come into receipt of the firearm * * *" (Tr. 225).

did not know how Batson had acquired the weapon (Apps. A and F, *infra*, 3a, 36a; Tr. 33-35, 38-42, 106-107, 160-169, 174-178, 196, 225).

The agents testified that during the November 19 meeting they told petitioner that if he was able to find out where Batson had obtained the pistol, they would inform the United States Attorney of respondent's cooperation in the event he was subsequently prosecuted. Agent Russell left his name and telephone number with respondent in case respondent decided to cooperate. The agents denied that they ever told respondent that he would not be prosecuted if he became an informant and aided their investigation (App. A, *infra*, 6a-7a; Tr. 42, 45, 161, 165, 187-188, 221). Respondent, on the other hand, contended at the suppression hearing that the agents had promised that he would not be prosecuted if he cooperated with them and that he would face a long jail sentence if he refused to cooperate (Tr. 103-108).

On January 12, 1977, respondent called the agents and requested a meeting. The agents picked respondent up at his home and drove him back to their office. After the agents had again informed respondent of his *Miranda* rights, he retracted his prior explanation of how he had obtained the gun. This time respondent stated that he had received the pistol from his half-brother and another individual, who were both involved in gun-dealing activities. At respondent's request, the agents paid respondent $10 to enable him to find the persons who had supplied him with the gun. Following this meeting the agents

accompanied respondent in an unsuccessful attempt to purchase firearms (Apps. A and F, *infra*, 3a-5a, 36a-37a; Tr. 37, 162, 199-200, 228-230).

Respondent admitted at the suppression hearing that he had made the inculpatory statements of January 12 and also acknowledged that he had given a false story to the agents on November 19. He claimed, however, that prior to telling the agents the truth on January 12 he had confirmed that the agents' alleged offer of immunity was still in effect (App. A, *infra*, 5a; Tr. 110-113, 123).

Finally, the testimony at the hearing revealed that respondent returned to the agents' headquarters on January 14, 1977, accompanied by his former wife. At that time Agent McCulloch informed respondent that his case had been referred to the United States Attorney for prosecution. Respondent stated that he was willing to work as an informant but that he had no money to travel about and pick up information. Agent McCulloch then gave respondent $50. Respondent thereafter never produced any information, arranged any firearms transactions, or otherwise acted as an informant (App. A, *infra*, 5a-6a; Tr. 201-203, 207, 223-224, 237, 243-247, 248).[4]

2. After holding the evidentiary hearing and considering the parties' written and oral submissions, the magistrate filed proposed findings of fact and recommendations for the disposition of respondent's

[4] The state charges against respondent were dismissed on February 22, 1977. Respondent's federal indictment was filed on March 1, 1977.

suppression motion in accordance with 28 U.S.C. 636(b)(1)(B) and (C). The magistrate found that respondent knowingly, intelligently and voluntarily made inculpatory statements on three separate occasions, after being informed of his *Miranda* rights on each occasion. Moreover, the magistrate expressly found that the testimony of the ATF agents was more credible than the story offered by respondent, and he specifically rejected respondent's claim that the agents had promised him immunity from prosecution in return for his cooperation. Accordingly, the magistrate recommended that respondent's motion to suppress his statements of August 8 and November 19, 1976, and January 12, 1977, be denied (App. G, *infra*, 39a-41a).

3. Respondent filed objections to the magistrate's report with the district court. Pursuant to 28 U.S.C. 636(b)(1), the district court made a *de novo* determination of respondent's suppression motion based on a review of the transcript of the evidentiary hearing before the magistrate, the magistrate's proposed findings and recommendations, and the oral and written arguments of counsel. The court agreed with the magistrate that respondent had voluntarily chosen to make statements to the agents on the three days in question, and it therefore denied the motion to suppress (App. E, *infra*, 33a-34a).[5]

[5] The district court also denied respondent's motion to dismiss the indictment. Respondent claimed that he should have been charged with violating 18 U.S.C. App. 1202(a), rather than Section 922(h), because the two statutes overlap and

4. The court of appeals reversed and remanded (App. A, *infra*, 1a-24a). The court first addressed respondent's statutory claims. It concluded that both the local court rules[6] and 28 U.S.C. 636(b)(1)(B) authorized the reference of respondent's suppression motion to a magistrate. In addition, in reliance on the language and legislative history of Section 636(b), the court held that the trial judge's decision to deny respondent's motion to suppress after reviewing the transcript of the evidentiary hearing, the magistrate's report, and the submissions of the parties, but without hearing the live testimony itself, did not constitute an abuse of discretion under the statute (*id.* at 8a-14a).

The court of appeals then addressed respondent's constitutional arguments based on Article III and the Due Process Clause. The court found that, because the statute requires the district court to make a *de novo* determination of any disputed portion of the magistrate's report or proposed findings or recommendation, reference of a suppression motion to a magistrate in accordance with Section 636(b)(1)(B) is not an unconstitutional delegation of judicial authority in violation of Article III (App. A, *infra*,

the former carries a lesser maximum penalty than the latter. See App. D, *infra*, 29a-31a. See also *United States* v. *Batchelder*, No. 78-776 (June 4, 1979).

[6] Local Magistrate Rule 1.01B(8) of the United States District Court for the Northern District of Illinois provides that a federal magistrate may assist the district court "in the conduct of pretrial proceedings" in a criminal case. The court of appeals construed this rule to cover the reference of a motion to suppress.

14a). The court of appeals held, however, that a district court's failure to defer to the magistrate's proposed fact findings in connection with a motion to suppress—which the statute does not permit (see note 8, *infra*)—deprives a defendant of due process, unless the district court itself hears the controverted testimony. In the court of appeals' view, at least where "credibility is crucial to the outcome," a "district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case" (*id.* at 24a). The court therefore remanded for another suppression hearing to be conducted personally by the district court judge (*id.* at 15a-24a).

The court of appeals denied the government's petition for rehearing en banc on May 4, 1979, with two judges dissenting (App. C, *infra*, 27a-28a & n.*).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the constitutionality of the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B). The court of appeals held that, although Section 636(b)(1)(B) provides that a district court may decide a suppression motion based on a review of the transcript developed before the magistrate, the magistrate's proposed findings and recommendations, and the submissions of the parties, the Due Process Clause nonetheless requires the district court to hear anew the testimony of the witnesses, at least where "credibility is crucial to the outcome" of the motion. The court of appeals has thus declared an Act of Congress unconstitutional as

applied in this case, and as a result it has substantially limited the usefulness of magistrates in the federal courts. Moreover, the court's holding conflicts with the decisions of other courts of appeals that have sustained the use of magistrates in similar situations. In these circumstances, review by this Court is warranted.[7]

1. The court of appeals correctly concluded that the Federal Magistrates Act, 28 U.S.C. ~~636~~ 636(b), provides for the kind of reference that occurred here. Section 636(b)(1)(B) states that the district court may "designate a magistrate to conduct hearings, including evidentiary hearings," regarding pretrial matters pending before the court, including a motion to suppress evidence in a criminal case.[8] Following the evidentiary hearing, the magistrate is required to submit to "the court proposed findings of fact and recommendations for the disposition" of the motion. Within 10 days, the parties may file written objections to the magistrate's report. Thereafter the district court

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[7] Indeed, if the court of appeals had rendered this decision in a civil proceeding involving the United States, the government would have had a right of appeal to this Court. See 28 U.S.C. 1252; *Fleming* v. *Rhodes*, 331 U.S. 100 (1947).

[8] Section 636(b)(1)(A) covers all magistrate references in pretrial matters except for certain enumerated motions such as motions to suppress. If the reference falls within subsection (A), the magistrate's determination is final and binding on the district court unless shown to be "clearly erroneous or contrary to law." *Ibid.* Matters excepted from subsection (A) may be referred to a magistrate for hearing under subsection (B), but as to those matters the district court may not defer to the magistrate's findings.

"shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." The legislative history of this provision makes clear that the court's obligation to decide the matter *de novo* does not include a requirement that it rehear the testimony adduced at the hearing before the magistrate:

> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate.

H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). See also 122 Cong. Rec. H12219 (daily ed. Oct. 1, 1976) (remarks of Rep. Railsback); *White* v. *Estelle*, 556 F.2d 1366 (5th Cir. 1977); *Campbell* v. *United States District Court*, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974).

We also agree with the court of appeals that references to a magistrate pursuant to Section 636(b)(1)(B) do not run afoul of Article III of the Constitution. "[T]he enforcement of federal criminal law [has not] been deemed the exclusive province of federal Art. III courts." *Palmore* v. *United States*, 411 U.S. 389, 402 (1973). Non-Article III courts, indeed even non-federal courts, have conducted federal criminal trials. *Id.* at 402-404. Moreover, because under Section 636(b)(1)(B) an Article III judge retains the ultimate adjudicatory power over all pretrial matters, transfer of a suppression motion to a magistrate for hearing and recommendation does not deprive a defendant of any rights protected by Article III. See 411 U.S. at 407-410; *Wingo* v. *Wedding*, 418 U.S. 461, 486-487 (1974) (Burger, C.J., dissenting); S. Rep. No. 94-625, 94th Cong., 2d Sess. 6 (1976). See also *Mathews* v. *Weber*, 423 U.S. 261, 269-270 (1976); Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 780-789 (1975).

The court of appeals erred, however, in concluding that the Due Process Clause requires a district judge, in ruling on a motion to suppress, to hear the testimony that has previously been evaluated by the magistrate. According to the court below (App. A, *infra*, 17a), at least in the context of a criminal case, due process demands that the "judicial fact-finding must be designed to foster a reliable determination of credibility," and "only two procedures [are] adequate to the task"—the trial judge must either "rehear the testimonial evidence" (*id.* at 15a) or must defer in its decisionmaking to the magistrate, who has had the opportunity to observe the witnesses (which the statute does not permit) (*id.* at 17a). But where, as here, the district court has adopted the magistrate's findings, the court of appeals' analysis makes little sense: if the district court had deferred to the magistrate, rather than deciding the matter *de novo*, it obviously would again have accepted the magistrate's findings and would again

have denied respondent's motion.[9] The fact that the district court made a more thorough review of the record and gave respondent a second opportunity to establish *de novo* that his statements should be suppressed cannot offend the Due Process Clause. See *Wingo* v. *Wedding*, *supra*, 418 U.S. at 486-487 (Burger, C.J., dissenting); *Mildner* v. *Gulotta*, 405 F.Supp. 182, 195 (E.D. N.Y. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976).

In determining what process is due in particular circumstances, this Court has identified several factors that must be considered (*Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[9] Of course, if the district court had deferred to the magistrate, it is arguable (although we would not agree) that the procedure would not have comported with Article III. Cf. *Ellis* v. *Buchkoe*, 491 F.2d 716, 717 (6th Cir. 1974); *Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973); *TPO, Inc.* v. *McMillen*, 460 F.2d 348, 356-359 (7th Cir. 1972).

[10] In cases where the district court disagrees with the magistrate's findings on a suppression motion that were favorable to the defendant, the Due Process Clause may require the court either to hear the critical testimony itself or to give a detailed statement of reasons for its conclusions. Compare *Campbell* v. *United States District Court*, *supra*, with *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975). This more difficult question is not presented here, since the district court accepted the magistrate's findings.

See also *Mackey* v. *Montrym*, No. 77-69 (June 25, 1979), slip op. at 8; *Parham* v. *J.L.*, No. 75-1690 (June 20, 1979), slip op. at 13-14; *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970). Application of these factors indicates that Section 636(b)(1)(B) is constitutional.

A defendant undoubtedly has a substantial interest in the fairness and outcome of his criminal trial. But it is the deterrence of official misconduct rather than the insurance of a correct determination of guilt or innocence that ordinarily underlies a suppression order. See, *e.g.*, *Lego* v. *Twomey*, 404 U.S. 477, 484-487 (1972); *United States* v. *Janis*, 428 U.S. 433, 454 & n.28 (1976).[11] Accordingly, the process due at a pretrial hearing is considerably less elaborate than the procedural protections that must be accorded a defendant at the actual trial. In a suppression hearing, for example, the government need only establish the admissibility of the challenged testimony by a preponderance of the evidence, the usual burden of proof in civil cases, whereas at trial the prosecution must prove a defendant's guilt beyond a reasonable doubt. See *Lego* v. *Twomey*, *supra*, 404 U.S. at 482-489. Similarly, in ruling on a motion to suppress, the court has discretion to rely upon hearsay evidence that would be inadmissible at trial. See *United States*

[11] Similarly, other pretrial motions that may be referred to a magistrate, such as a motion to dismiss an indictment for pretrial delay, do not ordinarily implicate the guilt or innocence of the defendant but rather involve some overriding soceital goal. See *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972).

v. *Matlock*, 415 U.S. 164, 172-177 (1974); *McCray* v. *Illinois*, 386 U.S. 300 (1967); Fed. R. Evid. 104 (a). Indeed, in other areas, such as administrative procedure, in which the magnitude of the private interest at stake may be quite substantial, the fact-finding procedure normally employed parallels that involved under Section 636(b)(1)(B): an administrative law judge makes initial findings following an evidentiary hearing, and the agency then enters its administrative findings based on a *de novo* review of the written record and the submissions of the parties. See, *e.g.*, 29 U.S.C. 160(c); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 482-497 (1951).

Moreover, "[s]ince the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts," *Lego* v. *Twomey*, *supra*, 404 U.S. at 486,[12] the procedures allowed by Section 636(b)(1)(B) do not present the "risk of an erroneous deprivation of" a defendant's liberty. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335; *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), slip op. at 13.[13] In fact, it is not at all apparent that the substitute procedures mandated by the court of appeals would reduce the chance of an incorrect determination of a suppression motion. Here, for example, respondent was given an opportunity at the suppression hearing to present evidence, cross-examine the government's witnesses, and argue his position both orally and in writing. After the magistrate had entered his findings and recommendations, respondent was allowed to register his objections, submit additional memoranda of law, and present oral argument before the district court. Thereafter, the court issued its decision based on the submissions of the parties, the transcript of the hearing, and the magistrate's report. Although requiring the district court to rehear the testimony might occasionally change the result of the suppression hearing, there is no reason to believe that the final determination would be more accurate. See also *Mackey* v. *Montrym*, *supra*, slip op. at 10-11.

Finally, the court of appeals' conclusion that the trial judge must rehear the testimony at a suppression hearing unquestionably will impose a substantial additional burden on the federal courts. In Fiscal Year 1978, magistrates made recommendations on 1,318 substantive criminal motions pursuant to Section 636(b)(1)(B). *1978 Annual Report of the Director of the Administrative Office of the United States Courts* A-144 (Table M-4). The court's decision will either necessitate two duplicative, full-dress evidentiary hearings or (more likely) eliminate the use of magistrates in many circumstances; either alternative would be contrary to the express

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[12] See also *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719, 727-728 (1966).

[13] In *Califano* v. *Yamasaki*, *supra*, the Court construed Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), to require a pre-recoupment hearing because, in part, the determination of waiver under that provision involves an evaluation of credibility. Slip op. at 13-14. Nothing in *Yamasaki* suggests, however, that the *Constitution* requires *two* evidentiary hearings when credibility is involved.

desire of Congress to alleviate the caseload congestion in the district courts. See H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 4-7 (1976); S. Rep. No. 94-625, 94th Cong., 2d Sess. 4-5 (1976).[14] Indeed, the need to hold two hearings with regard to virtually every suppression motion assigned to a magistrate without the defendant's consent not only will burden district judges, counsel, and witnesses, but also will tax other limited resources such as courtrooms and court reporters. Cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 260-261 (1973) (Powell, J., concurring). In short, the decision below effectively renders useless this important tool in the administration of justice in a significant number of cases.[15]

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[14] See also S. 237 and H.R. 1046, 96th Cong., 1st Sess. (1979), which are pending bills that would expand further the use of magistrates to assist the district courts.

[15] The court of appeals attempted to limit its holding to suppression motions in which "credibility evidence is central to the determination of a material issue of fact" (App. A, *infra*, 16a). But, as the court quickly conceded (*id.* at 17a), most motions to suppress will involve crucial questions of credibility, especially if the motion requires an evidentiary hearing for its resolution. See, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966). Indeed, the decision below may have even greater impact than the court acknowledged. In FY 1978, magistrates made recommendations in 8,332 matters involving criminal indictments and conducted 966 probation revocation hearings and 458 hearings on prisoner petitions. *1978 Annual Report*, *supra*, at A-144 to A-145. Because many of these proceedings, which are part of the criminal justice process, involve findings of credibility, the court of appeals' construction of the Due Process Clause might preclude effective use of a magistrate in these cases as well.

2. The court of appeals' decision conflicts with decisions of the Fifth and Ninth Circuits. In *Campbell* v. *United States District Court*, 501 F.2d 196, 205-207 (9th Cir.), cert. denied, 419 U.S. 879 (1974), the court held that a magistrate may constitutionally preside over a pretrial motion to suppress evidence in a criminal case, provided that the district court makes a "*de novo* determination" of the motion. The court was not required to rehear the evidence. Although *Campbell* was decided under the predecessor version of the Federal Magistrates Act, there is no reason to believe that the Ninth Circuit would reach a different result today. Indeed, Congress expressly modeled the 1976 changes in the Act on the *Campbell* opinion, including use of the phrase "*de novo* determination." See H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3-4 (1976).[16]

More recently, the Fifth Circuit (in a case decided under the current statute) has explicitly rejected the position taken by the court of appeals in this case. *United States* v. *Whitmire*, 595 F.2d 1303 (5th Cir. 1979). In *Whitmire*, the court of appeals held that the reference to a magistrate of a suppression motion involving a Fourth Amendment claim did not violate the Due Process Clause, even though it was

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[16] The Ninth Circuit subsequently held that the district court must rehear the critical testimony where it *rejects* findings and recommendations of the magistrate based on credibility determinations. *United States* v. *Bergera*, *supra*. The court of appeals reiterated, however, that where the district court accepts the findings of the magistrate it need not rehear the testimony. *Id.* at 394. Here, of course, the district court agreed with the magistrate's findings and recommendations.

the magistrate who "had a first-hand look at the witnesses and appraised their credibility." *Id.* at 1305. The court expressly acknowledged that its "holding differs with that of the Seventh Circuit in * * * *Raddatz*" (*id.* at 1306 n.1), but it nonetheless concluded that the procedures established by Section 636(b)(1)(B) "provide sufficient safeguards both to ensure the integrity of the factfinding process and retention by the judge of final responsibility for ruling on the motion." *Id.* at 1305. See also *White* v. *Estelle, supra; Parnell* v. *Wainwright*, 464 F.2d 735 (5th Cir. 1972).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

JULY 1979

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HERMAN RADDATZ, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 77-Cr-325—Nicholas J. Bua, *Judge*

Argued November 9, 1978—Decided February 6, 1979

Before CUMMINGS, SPRECHER, and WOOD, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The district court found the defendant, Herman Raddatz, guilty of violating 18 U.S.C. § 922(h), receipt of a firearm in interstate commerce by a convicted felon, and imposed a five year sentence.[1] The Government concedes on appeal

[1] Ultimately the judge modified the sentence to require only six months incarceration, but to be followed by 4½ years probation.

that the sentence imposed was improper under our decision in *United States* v. *Batchelder*, —— F.2d —— (7th Cir. 1978), *cert. granted*, —— U.S. —— (1979).[2]

The defendant argues additionally, however, that the reference of his motion to suppress evidence to a magistrate under 28 U.S.C. § 636(b)(1)(B) violated both the Due Process Clause and Article III of the Constitution. We conclude that the defendant was denied Due Process and accordingly reverse and remand for a new hearing on the motion to suppress before the district court.

I

On August 8, 1976, two Chicago police officers, Monroe Vollick and James Bach, arrested the defendant for unlawful use of a weapon. Officer Vollick testified at trial that just prior to his arrest, the defendant was found standing over a man with a bleeding head injury. The defendant was holding a gun. The bleeding man, Jimmy Batson, told the officers that he had fallen down. Officer Vollick testified that while in custody, Raddatz told the police that he had been fighting with Batson over a family matter.

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[2] Although 18 U.S.C. § 924 authorizes a maximum sentence of five years for violations of § 922(h), another section of the criminal code describes the same offense but authorizes a maximum sentence of only two years. In *Batchelder* we held that, "[i]t is impermissible to sentence a defendant for five years under Section 922(h) when he could receive only a two year maximum sentence under Section 1202(a)." —— F.2d at ——.

The officer further testified that Raddatz stated he had brought the gun with him in case any of Batson's friends were around. A formal state charge was filed against the defendant on October 27, 1976.

Paul Russell and Richard McCulloch, Special Agents for the Bureau of Alcohol, Tobacco and Firearms learned from Officer Vollick that a state firearm charge was pending against the defendant. The agents were also aware that Raddatz was a convicted felon, and that the gun had traveled in interstate commerce (two of the elements necessary for the prosecution in issue).

On November 19, 1976, McCulloch and Russell interviewed Raddatz at his home. After reading *Miranda* warnings to him, Russell told Raddatz that the gun which was recovered from the defendant's possession on August 8 had been traced to its last owner, a victim of an unsolved homicide in another state. The defendant told the agents that he had taken the gun from Batson to pistol-whip him and did not know where Batson had acquired the gun.

On January 12, 1977, the defendant called the firearms agents and requested a meeting. The agents picked Raddatz up and brought him to their office. The defendant there informed the agents that his earlier statement of November 19 was incorrect. He told the agents that he had not taken the gun from Batson and related to them how he had acquired it.

The state charges were dismissed on February 22, 1977. A federal indictment under 18 U.S.C. § 922(h) followed on March 1, 1977. Pretrial motions, includ-

ing a motion to suppress various statements made by the defendant, were filed on May 4, 1977. Over the defendant's objection, the district court judge referred the motion to suppress to a magistrate for hearing.

At the hearing before the magistrate, defense counsel attempted to demonstrate that the January 12, 1977 statement of the defendant was involuntary because it was made in reliance on promises of the agents that the case against him would be dismissed if he cooperated.[3] If the agents had promised a dismissal of the indictment in exchange for information about the origins of the gun the statement would in all likelihood be suppressed. *See Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964) (citing the statement of *Bram* v. *United States*, 168 U.S. 532, 542-43 (1897) that the "constitutional inquiry is . . . whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .'"). The January 12 statement was relied upon by the Government to establish two of

[3] The defendant also challenges the admissibility of the statements on alternative grounds. Defendant argues that the waiver of the privilege against self-incrimination is not valid because the agents' version of the events suggests that they intentionally misled the defendant to believe that he was not in jeopardy of prosecution. Defendant also argues that the statements are excludable because his right to counsel was violated at two of the interviews. In view of our ultimate disposition, we need not consider these claims.

the essential elements of the offense, thus underscoring the dispositive character of the motion.

The defense elicited two varieties of evidence to support a finding of inducement: testimony of the promise and of a course of conduct suggestive of a prior promise. The defendant testified that at the November 19 meeting Russell told him that he was going to be indicted by federal prosecutors. If the defendant would cooperate with the agents, however, "somebody would talk to the prosecutor, and it would be dismissed." The defendant further testified that he was advised that otherwise he would be given a lengthy sentence in a federal penitentiary. The defendant stated that his meeting with the agents on January 12 was motivated solely by his decision to take advantage of the agents' offer. He testified that before he gave the corrected statement on January 12, the agents assured him that their offer of November 19 was still good.

The defense also introduced testimony to establish a course of cooperation with the agents to support the inference of a promise. First, it is uncontested that the defendant's January 12 trip to see the agents was unsolicited. On that date he gave them all the information he had about the gun he had used on August 8, implicating his half-brother and another individual in gun-dealing activities. The agents gave him $10 on that date to enable him to locate the people from whom he had obtained the gun. On January 14, the defendant brought his wife with him to the agents' office to discuss again activity as

an informant. McCulloch gave him $50 at that meeting. On a later date, the defendant took McCulloch to an area of the city where he claimed guns were being sold illegally. He also turned over some additional names of possible firearms violators. The defendant, however, never set up a gun sale for the agents.

The defendant claims that this course of conduct circumstantially supports his testimony that a promise had been made on November 19, 1976. He argues that it is not credible to believe that he just casually volunteered this self-incriminating information. Further, he argues that the agents immediately treated him as an informer when he contacted them because that was in accord with the prior agreement they had made.

Although the agents are essentially in agreement with this account of the conduct which transpired, they deny any November 19 promise to obtain dismissal of anticipated charges in exchange for cooperation. Agent Russell supported this contention by stating that as of the November 19 meeting Raddatz was not even an object of investigation. The purpose of the November 19 meeting was to obtain information about the prior ownership of the gun confiscated from Raddatz on August 8, since the gun had been used in an unsolved homicide. Russell stated that he had met Raddatz on only two occasions, November 19 and January 12. At one point in the hearing he denied that he discussed any possibility of cooperation with the defendant on either date. On cross-examination however, Russell stated that he told the defendant on November 19 that if Raddatz would cooperate in locating Batson, Russell would mention the defendant's cooperation to the United States Attorney in the event a case was brought against him. Russell stated that the request for cooperation was limited to assistance in tracing the ownership of the gun and that Raddatz had not been recruited to act as an informant.

McCulloch also testified that no promise was made to Raddatz on November 19. However, McCulloch's testimony varies from Russell's in several respects. First, McCulloch testified that the purpose of their November 19 visit was to obtain the venue information which they needed to initiate a prosecution against Raddatz. He also specifically testified that the agents sought Raddatz's cooperation as an informant at the January 12 meeting and suggested that Raddatz had been told on November 19 that favorable mention would be made to the United States Attorney if he cooperated. Although the agents concede that Raddatz cooperated by giving them information about the gun used on August 8, no mention of this cooperation was made to the United States Attorney. McCulloch explained that the agents did not speak to the United States Attorney on the defendant's behalf because he never gave the type of cooperation they requested—arranging a gun sale.

On the basis of this testimony, the magistrate recommended that the motion to suppress be denied. He specifically stated, "I find the testimony of the

Alcohol, Tobacco and Firearms agents more credible. . . . I find that Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated." The defendant filed objections to the magistrate's recommendation with the district court. After reading the transcript of the motion to suppress and hearing arguments by both parties the district court overruled the objections and adopted the recommendation of the magistrate. The judge did not hear testimony from the witnesses who appeared at the suppression hearing before the magistrate.

II

The defendant's principal contention on appeal is that his conviction was improper because his motion to suppress was heard before a magistrate and not before the trial court judge. In 1976, Congress amended the United States Magistrates Act to clarify that motions to suppress, as well as a variety of other motions, could be referred to magistrates for a hearing. 28 U.S.C. § 636(b)(1). The amendment was enacted to overrule the Supreme Court construction in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), of Congressional intent as precluding magistrates from hearing motions to suppress.

The defendant argues that despite the clear statutory authorization, the reference in this case was improper on several grounds. The primary contention is that the reference was made in a manner which violated both Article III and the Due Process Clause of the Constitution. In addition, the defendant argues that the reference was invalid because not made pursuant to required enabling rules. The defendant finally suggests that it would be appropriate for this court to exercise its supervisory powers to prohibit the procedure employed in this case. Since it is well established that it is preferable to avoid constitutional adjudication we address the non-constitutional arguments of the parties first.

Section 636(b)(4) of the Act requires that "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties." The defendant argues that the district court did not have the power to refer the hearing on the motion to suppress to a magistrate, because no rule of the district court explicitly provided for this category of reference. He reasons that an explicit rule is required by the statute and that the district court's failure to enact such a rule rendered the reference *void ab initio*, necessitating a new hearing pursuant to valid rules. The local rules enacted in 1975 provide that magistrates are

> authorized to exercise all powers and perform all duties now or hereafter authorized by the Constitution and laws of the U.S., applicable Federal Rules of Civil and Criminal Procedure, local rule, order or regulation.

Loc. Mag. R. 1.01A. The rules further provide:

> Without limiting the general grant of authority in paragraph 1.01A, the U.S. Magistrates in this district are authorized to perform the following duties in criminal cases:
>
> . . . .

> Upon reference by a judge of this court, assist the judge in the conduct of pretrial proceedings including, but not limited to, hearing and ruling upon all discovery motions pursuant to Rule 16 of the Federal Rules of Criminal Procedure and conducting pretrial conferences pursuant to Rule 17.1 of the Federal Rules of Criminal Procedure.

Loc. Mag. R. 1.01B(8). We are not convinced that the rules are so devoid of content as to deprive the lower court of any power to make this reference under the statute. Congress mandated that the district court establish rules. Rules have been established, and those rules can be construed to authorize the reference of a motion to suppress—a "pretrial proceeding"—to a magistrate. Although in some cases the defendant might properly challenge the sufficiency of the rules, this is not such a case. The defendant does not allege any deficiency in the magistrate's discharge of his duties—the subject of the required rules. Thus he cannot establish any prejudice from the failure of the district court to enact more precise standards. The statutory mandate to enact rules was satisfied.

It is also not possible to avoid the constitutional questions presented by resort to our supervisory powers. The defendant requests that this court exercise its supervisory powers to prevent the procedure employed in this case either by prohibiting referral of motions to suppress to magistrates or by requiring the trial judge to rehear the contested evidence presented to the magistrate. Both of these solutions are

unavailable. The appellate courts must be ever wary that it is only appropriate to "supervise" when Congress has not. As the Supreme Court stated in *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 589 (1948), "Our general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it. . . ." *See also Palermo* v. *United States*, 360 U.S. 343 (1959); Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Powers of Federal Courts*, 72 Nw. U.L. Rev. 595, 622 (1977). In *National City Lines*, the Court instructed that before exercising supervisory power, the court must examine the purpose of relevant statutes to ascertain whether "room was left for judicial discretion" to impose extra-constitutional requirements. 334 U.S. at 588.

The Magistrates Act and its history clarify that this court cannot use the supervisory power to prevent the reference of a motion to suppress to a magistrate or to require the district court judge to personally hear the evidence on a motion that has been referred to a magistrate. The statute is explicit on both issues. Section 636(b)(1) provides:

> (b)(1) *Notwithstanding any provision of law to the contrary*—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the

pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. . . .

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge *may* also receive further evidence or

recommit the matter to the magistrate with instructions.

(Emphasis added). The House Report accompanying the bill states that although the judge must make a "de novo determination" this "is not intended to require the judge to actually conduct a new hearing on contested issues." *H. Rep. No.* 94-1609, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6163.

The legislative history underscores that this use of the supervisory power would be inconsistent with the purposes of the amendments. Expressly relying on the House Committee on the Judiciary's own responsibility for the "oversight of the federal courts," Congress designed the statute to enable the district court judges, through increased use of magistrates, to "have more time to preside at the trial of cases having been relieved of part of his duties which required the judge to personally hear each and every pretrial motion or proceeding necessary to prepare a case for trial." *Id.* at 6166. *See also id.* at 6173. Although Congress did not prohibit the district court from rehearing evidence presented to the magistrate, the statute invests the *district court judge* with discretion to make that procedural decision. *Id.* at 6162-63. The appellate court can now only review, and not divest, the lower court of that discretion. As in *National City Lines*, we must conclude that the Congressional purpose to broaden the procedural choices of a district judge cannot be "narrowed by applica-

tion of a vague and discretionary power." 334 U.S. at 581.

III

The constitutional questions are dispositive of this appeal. The defendant rests his challenge to the procedure employed in this case on both Article III and Due Process. Although our construction of the statute satisfies Article III, we conclude that defendant's Due Process rights were violated.

Article III requires that the judicial power of the United States be vested in Article III judges. The defendant argues that the Magistrates Act, when applied to allow the reference of a hearing on contested facts, unconstitutionally delegates judicial power to a non-Article III judge. Anticipating potential Article III objections to an expanded role for federal magistrates, Congress resolved to avoid any such objections by requiring that a district court judge "shall make a de novo determination" on contested aspects of a magistrate's recommendation in case-dispositive motions. 28 U.S.C. § 636(b)(1)(C). *See Sick* v. *City of Buffalo*, 574 F.2d 689, 693 n.17 (2d Cir. 1978). The Supreme Court in *Mathews* v. *Weber*, 423 U.S. 261, 270 (1976), emphasized that the statute clearly requires the Article III judge to make a de novo determination. Article III is therefore satisfied. *Sick* v. *City of Buffalo*, 574 F.2d at 693; *Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973).

The trial judge in this case exercised his discretion to make the de novo determination on the basis

of the written record without hearing the witnesses' testimony. Although the statute does not mandate the judge to rehear the testimonial evidence, the Due Process Clause of the Constitution does. We conclude that the procedure employed in this case denied defendant his Due Process right to a meaningful hearing before the trier of fact on his motion to suppress.[4]

There is no question that Due Process guarantees a meaningful hearing and procedures sufficient to ensure a reliable determination of the facts underlying a motion to suppress. *Jackson* v. *Denno*, 378 U.S. 368, 376-77 (1964), *United States* v. *Bergera*, 512 F.2d 391, 393 (9th Cir. 1975). Due Process, however, does not encompass any fixed requirement that the trier of fact personally hear the evidence in every case. Courts have on occasion upheld the constitutionality of decisions rendered by a trier of fact who decided the case on the basis of a transcript. *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967); *Van*

[4] Although we conclude that the procedures employed were insufficient to ensure an accurate de novo determination, we cannot conclude from this record that the judge simply abused his discretion under the statute by not making the required de novo determination. Similarly, although courts have suggested that Article III is only satisfied when the trial court retains and *exercises* de novo decision making power, *see Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973), we do not conclude that Article III was violated. The trial court may well have made a de novo judgment, but we simply do not believe that the judgment was derived from constitutionally adequate procedures.

Teslaar v. *Bender*, 365 F. Supp. 1007 (D. Md. 1973). The command of Due Process is only that the defendant be given a "hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The precise question then is whether the nature of this case necessitates that the trier of fact personally hear the evidence in order to ensure a meaningful determination of the facts. We conclude that it does.

Several aspects of the "nature of this case" demonstrate why the trier of fact must necessarily have heard the evidence himself to guarantee the substantial rights of the defendant. We emphasize that this is a criminal case,[5] tried in an Article III court.[6] The defendant has not consented to the procedure employed by the judge,[7] and credibility evidence is central to the determination of a material issue of fact.

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[5] The nature of the right at stake dictates the degree of procedural precaution due by the judicial system. In criminal cases, the procedural protections must be the greatest. *See, e.g., United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463 (2d Cir. 1972). Thus whether this procedure may satisfy Due Process in some civil cases is a question we need not decide.

[6] *See Rogers* v. *Loether*, 467 F.2d 1110, 1116 (7th Cir. 1972), *aff'd sub nom. Curtis* v. *Loether*, 415 U.S. 189 (1974), suggesting a distinction between procedures required in judicial rather than statutory courts.

[7] A number of courts have upheld references to a magistrate when done with the consent of the parties. *Sick* v. *City of Buffalo*, 574 F.2d 689, 690 n.5 (2d Cir. 1978); *Reciprocal Exchange* v. *Noland*, 542 F.2d 462, 463 (8th Cir. 1976); *De Costa* v. *CBS, Inc.*, 520 F.2d 499, 503-08 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

It is quite clear from the record that in this case credibility is determinative, as in many motions to suppress. *See Brown* v. *Illinois*, 422 U.S. 590, 603 (1975); *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966). The success or failure of the motion to suppress—and in effect the prosecution itself—depends upon whether the judge believes or disbelieves the defendant's statement that the law enforcement officers promised him that a federal charge against him would be dropped if he cooperated. This is perhaps the most significant factor in determining what fact-finding procedures must be employed.

The nature of the evidence necessary for decision inevitably must affect the type of procedures required to evaluate the evidence. It has been emphasized for decades that judicial fact-finding must be designed to foster a reliable determination of credibility. *Wingo* v. *Wedding*, 418 U.S. 461, 474 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); *Holiday* v. *Johnston*, 313 U.S. 342, 352 (1941). The courts have generally recognized only two procedures as adequate to the task. Of course the most common method of determining credibility is to require the trier of fact to observe the demeanor of the witnesses. Alternatively, when the ultimate trier of fact has not seen and heard the witnesses, credibility is accounted for by requiring the trier of fact to afford substantial deference to the factual determination of the judge or examiner who did hear the witnesses. *See, e.g.*, the doctrine requiring appellate courts to defer to trial

court findings of fact unless "clearly erroneous." FED. R. CIV. P. 52(a); *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 394-95 (1948); *Aunt Mid, Inc.* v. *Fjell-Oranje Lines*, 458 F.2d 712, 716 (7th Cir.), *cert. denied*, 409 U.S. 877 (1972); *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 153 F.2d 85, 88 (7th Cir.), *vacated on request of parties*, 328 U.S. 818 (1946). *See also* FED. R. CIV. P. 53(e)(2), requiring the district court to accept a master's findings of fact unless clearly erroneous.

Neither of these procedural devices for assessing credibility was employed in this case. First, the statute itself prohibits any reliance on the latter procedure of according substantial deference to the findings of the individual who heard the evidence. The statute expressly requires the district judge to make a de novo determination of contested issues of fact—a mandate incompatible with the practice of according deference sufficient to ensure that demeanor evidence is adequately weighted. And although the statute would not have prevented reliance on the alternate device—hearing the testimony—the judge exercised his discretion not to hear it and made his determination on the written record alone.

Our reading of the record convinces us of the wisdom of the traditional practice. The record here does not reveal a pattern of facts that exposes the defendant's testimony as wholly incredible. Thus the truth cannot be derived from this written record without an intolerably high margin of error—a margin of error that time-honored tradition teaches can be substantially reduced by simply requiring the trier of fact to hear and observe the witnesses.

Prior precedents uniformly support our conclusion that the responsibility for the hearing and the decision must be vested in the same judge in a criminal case where credibility is essential. This rule of decision emerges in several classes of cases. Of most direct relevance, the rule has been applied in cases involving references to magistrates. In *Noorlander* v. *Ciccone*, 489 F.2d 642, 648-49 (8th Cir. 1973), the Eighth Circuit held that although evidentiary hearings in habeas cases could be referred to magistrates under the Act, Due Process required that if a defendant objected to the magistrate's determination of a material fact, "an Article III judge . . . [must] personally take the testimony of the witnesses, determine their credibility and decide for himself what the facts are." *Id.* at 648.[8] The Ninth Circuit, in *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975), stated that absent deference to the magistrate's recommendation,[9] Due Process requires the judge to hear the testimony and prohibits a decision based solely on the transcript. *Id.* at 394. The same result

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[8] Although a Due Process case, *Noorlander* was actually decided on the Due Process right of the party to have his case heard by an Article III judge. Here we decide only that defendant had a Due Process right to a meaningful hearing.

[9] The court in *Bergera* suggests that its prior decision in *Campbell* v. *United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), permitting the trial

was reached by the First Circuit in *O'Shea* v. *United States*, 491 F.2d 774, 778 (1st Cir. 1974) (grounds for decision not stated). *Cf. McKinney* v. *Parsons*, 488 F.2d 452 (5th Cir. 1974). Although not decided under the United States Magistrates Act, Judge Weinstein found, in a comprehensive opinion, that lawyers were denied Due Process by New York, disciplinary proceedings which provided a testimonial hearing only before a magistrate, and not before the judge responsible for a de novo determination. *Mildner* v. *Guloota*, 405 F. Supp. 182, 201-33 (E.D. N.Y. 1975) (dissenting opn.), *aff'd mem.*, 425 U.S. 901 (1976). *See also United States* v. *Vater*, 259 F.2d 667, 674 (2d Cir. 1958) (dissenting opn.) (Lumbard, J.).

This circuit has applied this principle in another line of cases. In *Smith* v. *Dental Products Co.*, 168 F.2d 516 (7th Cir. 1948), and *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 153 F.2d 85 (7th Cir.), *vacated on request of parties*, 328 U.S. 818 (1946), we held that when a judge who held a hearing dies before ruling, a successor judge may not rely on the transcript of the hearing to render a decision.

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court to *accept* the magistrate's recommendation without rehearing the evidence, is not inconsistent. 512 F.2d at 392. We are in total accord with the court's conclusion in *Bergera* that Due Process is only satisfied if the trial court defers to the magistrate or rehears the evidence. We do not not believe however that the degree of deference suggested by *Bergera* and Due Process is consistent with the statutory requirement of a de novo determination.

Due Process requires that the witnesses be heard by the successor judge. The same result has been reached in other circuits on various grounds. *See United States* v. *Nugent*, 100 F.2d 215, 217 (6th Cir. 1938), *cert. denied*, 306 U.S. 648 (1939); *Bromberg* v. *Moul*, 275 F.2d 574 (2d Cir. 1960). *See also* FED. R. CIV. P. 63; FED. R. CRIM. P. 25; 7 MOORE'S FEDERAL PRACTICE ¶ 63-05 at 63-9 (2d Ed. 1978).

Finally we rely on Judge Friendly's decision in *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463 (2d Cir. 1972). In *Mancusi*, the defendant challenged a New York procedure permitting an appellate court to enter a conviction for a lesser offense when improperly admitted evidence would require reversal of the offense for which the defendant was convicted. The Second Circuit found this procedure constitutionally deficient, reasoning that the appellate court was assuming the role of the decider of fact without benefit of observing the evidence. Judge Friendly stated that:

> Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of the facts having heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand. . . . It . . . [is] for the judge who saw and heard the witnesses at the trial . . . to determine where the truth lay—not for appellate judges reading a cold record.

Id. at 469-70.

We are aware of no persuasive authority to the contrary. Some decisions in the administrative context have permitted the trier of fact to render a judgment on the basis of a written record. In *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967), Judge Friendly found that no Supreme Court decision "suggests that the decider must actually hear the witnesses or be furnished a report on their credibility; the thrust is quite the opposite." *Id.* at 132. But in *Mancusi*, Judge Friendly specifically limited his opinion in *Utica Mutual Insurance Co.*, stating:

> [I]n criminal cases Chief Justice Hughes' much cited statement, "The one who decides must hear," *Morgan* v. *United States*, 298 U.S. 468 (1936), applies in full force, *without the qualifications* that have been recognized for certain civil and administrative proceedings. *Cf. Utica Mutual Ins. Co.* v. *Vincent*. . . .

457 F.2d at 469 (emphasis supplied).

Nor do we believe that any case decided under the Magistrates Act advises a contrary result. *Mathews* v. *Weber*, 423 U.S. 261 (1976), cited by the government, upheld the authority of a magistrate to make an initial finding on the substantiality of the evidence supporting a social security determination. The district court judge in *Mathews* was in a position to review meaningfully the recommendations of the magistrate since the record for decision was closed, *i.e.*, the magistrate did not conduct any hearings. As a result, demeanor and veracity were not issues to be

determined by the magistrate or the judge. *Compare Goldberg* v. *Kelly*, 397 U.S. 254 (1970), *with Richardson* v. *Perales*, 402 U.S. 389 (1971).

Campbell v. *United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), decided before the 1976 amendments, did suggest that it would be constitutional to permit the trial court to accept the magistrate's findings without a new hearing. We believe however that the Ninth Circuit in its subsequent opinion in *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975), modified the constitutional import of *Campbell* in a way that substantially conforms with our holding here.[10]

Finally, we do not believe that Chief Justice Burger's dissenting opinion in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), advises a contrary conclusion as argued by the government. In *Wingo*, the majority of the Supreme Court determined that the United States Magistrates Act, as then in force, did not permit the district court to refer evidentiary hearings on habeas petitions to magistrates. In a dissenting opinion, the Chief Justice concluded that the Act did permit the reference (as the later amendment now clearly provides). Although he also concluded that so construed, the Act was constitutional, we do not read the Chief Justice's opinion to say that when credibility is essential to the disposition of con-

---

[10] *See* note 9 *supra*. We also do not read *White* v. *Estelle*, 556 F.2d 1366 (5th Cir. 1977), to reach a contrary result since the parties apparently raised no constitutional objections to the reference.

tested issues the trial court can constitutionally dispense with a hearing. *Id.* at 486-87. That issue was not addressed.

We readily accept the Chief Justice's suggestion that the Act's provisions permitting magistrates to conduct hearings on motions to suppress are constitutional. Congress did not require the trial court to determine this case on the basis of a written record alone. We decide only that the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case where credibility is crucial to the outcome. Whether the district court satisfies this constitutional requirement by prohibiting references of motions to suppress, or simply requires a hearing of the testimony if an objection is made to a recommended finding, is a matter appropriately resolved by the lower court through its rulemaking power.

The conviction is reversed and remanded for a new hearing on the motion to suppress before the district court judge.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE SPRECHER

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 6, 1979

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

No. 78-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HERMAN RADDATZ, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Crim. No. 77 CR 325—Nicholas J. Bua, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, and REMANDED, for a new hearing on the motion to suppress before the District Court judge, in accordance with the opinion of this court filed this date.

APPENDIX C

CORRECTED on May 22, 1979

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 4, 1979

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Harlington Wood, Jr., Circuit Judge

No. 78-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

HERMAN RADDATZ, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 77 CR 325—Judge Nicholas J. Bua

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by the plaintiff-appellee and the response filed by the defendant-appellant, a vote of the

active members of the Court have voted to deny a rehearing *in banc.** All of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judge Philip W. Tone did not participate in the consideration of the petition for rehearing *in banc.*

* Chief Judge Fairchild and Judge Pell voted to grant rehearing *in banc.*

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HERMAN L. RADDATZ, DEFENDANT

Before Honorable Nicholas J. Bua, Judge
United States District Court

ORDER

The defendant, Herman L. Raddatz, was indicted for violation of Title 18, United States Code, Section 922(h)(1). The cause was tried to the court without a jury on stipulated facts. Prior to ruling, the court must decide two pending motions. They are: 1) defendant's motion to dismiss the indictment; and, 2) defendant's motion to strike surplusage from the indictment.

18 U.S.C. § 922(h)(1) provides in pertinent part:

> (h) It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; to receive any firearm or ammunition which has been shipped or transported in interstate commerce.

The maximum penalty for a violation of § 922(h)(1) is five years imprisonment and a $5,000 fine.

18 U.S.C., Appendix, § 1202 provides in pertinent part:

> Any person who—(1) has been convicted . . . of a felony, and who receives . . . in commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

"Receipt" for purposes of both § 922 and § 1202 covers the intrastate receipt of a firearm that previously had moved in interstate commerce. *Barrett* v. *United States*, 423 U.S. 212, 96 S.Ct. 498, 46 L.Ed. 2d 450 (1976); *United States* v. *Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed. 488 (1971).

Defendant moves to dismiss the indictment herein on grounds that the government's choosing to prosecute under § 922, with its attendant greater penalty, violates his Fifth Amendment rights to due process and equal protection of the law. See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 53 L.Ed. 2d 514 (1975). Moreover, defendant contends that permitting the United States Attorney to choose between two statutes proscribing identical conduct but with different permissible penalty ranges also violates the constitutional principle of separation of powers.

The government, while agreeing that both § 922 and § 1202 proscribe identical conduct relative to the receipt of firearms by felons, argues that the re-

turn of the instant indictment constitutes a proper exercise of prosecutorial discretion.

In light of the fact that Congress enacted both statutes simultaneously and without relevant change by different titles of the Gun Control Act of 1968, this court cannot now say that it was the intent of Congress that § 922(h) was to be comprehensive to the exclusion of § 1202(a)(1). See *United States* v. *Phillips*, 522 F.2d 388, 393 (8th Cir. 1975). Furthermore, our Supreme Court, both in *United States* v. *Bass*, 404 U.S. 336, 343 n.10 (1971) and in *Barrett* v. *United States*, 423 U.S. 212, 223 (1976), did not note any constitutional difficulty in the coexistence of § 922(h) and § 1202(a)(1).

Therefore, the court holds: 1) that the government's choosing to prosecute under § 922, with its attendant greater penalty, does not violate defendant's Fifth Amendment rights to due process and equal protection of the law; and 2) that permitting the United States Attorney to choose between two coexistent statutes which proscribe identical conduct relative to the receipt of firearms by felons, but with different permissible penalty ranges, does not constitute an abuse of prosecutorial discretion nor violate the principle of separation of powers. Accordingly, defendant's motion to dismiss the indictment is denied.

Defendant also moves to strike surplusage from the indictment.

Rule 7(c)(1) Fed. R. Crim. P. provides that an indictment shall be a plain, concise and definite writ-

ten statement of the essential facts constituting the offense charged.

An essential element of 18 U.S.C. § 922(h) is that the individual receiving the firearm had previously been convicted of a crime punishable by imprisonment for a term exceeding one year.

In the instant indictment, the government has set forth eight prior felony convictions of the defendant.

In light of the fact that one or more of the convictions specified in the indictment may prove to be defective; and that the government is not limited to establishing only one prior conviction where there has been a plurality of convictions; and since proof of a prior conviction is a requisite element of the offense charged, the court holds that the setting forth of more than one prior felony conviction in the indictment comports fully with Rule 7(c)(1) and does not constitute surplusage. Accordingly, defendant's motion to strike surplusage is denied.

As hereinbefore set forth, the instant cause was tried to the court without a jury on stipulated facts. Based upon the facts as stipulated, the court finds the defendant, Herman L. Raddatz, guilty as charged in the indictment beyond a reasonable doubt.

/s/ Nicholas J. Bua
NICHOLAS J. BUA
United States District Court

DATED: Feb. 6, 1978

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HERMAN L. RADDATZ, DEFENDANT

Before Honorable Nicholas J. Bua, Judge
United States District Court

ORDER

Before the court is defendant's motion objecting to the referral of defendant's motion to suppress to United States Magistrate Carl Sussman for hearing.

Defendant contends that the reference to the Magistrate violates Article III of the United States Constitution and Title 28 United States Code § 636(b)(4).

In that respect, the court holds that Title 28 United States Code § 636(b)(1)(B) authorizes a district judge to designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to the court proposed findings of fact and a recommendation for the disposition of a motion to suppress evidence, notwithstanding that pursuant to § 636(b)(4) this court has not yet adopted any local rules outlining the procedures to be employed by the mag-

istrate in the performance of his duties. Section 636 (b) (4), the provision for implementing local rules, is merely for the purpose of insuring that there will be an equitable allocation of magistrate services among the various judges of the district court and to provide adequate notice to the bar as to the extent of use of magistrates by the court. There is no issue in this regard raised by the defendant.

Therefore, having read the transcript of the hearing on the motion to suppress, the proposed findings of fact, conclusions of law, and memoranda in support thereof as submitted by both sides, the report and recommendation of the magistrate, and after hearing the arguments of the parties, the court hereby accepts the recommendation of the magistrate and adopts the Government's Proposed Findings of Fact as the court's findings. The court further finds that the three statements given by the defendant and sought to be suppressed were made voluntarily.

Accordingly, the defendant's motion objecting to the referral of the motion to suppress will be denied and the motion to suppress the statements will also be denied.

ENTER:

/s/ Nicholas J. Bua
NICHOLAS J. BUA
United States District Court

DATED: December 8, 1977

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA

v.

HERMAN L. RADDATZ

STIPULATION

IT IS HEREBY STIPULATED by and among THOMAS P. SULLIVAN, United States Attorney for the Northern District of Illinois, Eastern Division, and defendant, HERMAN L. RADDATZ, individually and by and through his attorney, JOAN B. GOTTSCHALL, as follows:

1. The evidence presented at the hearing on defendant's motion to suppress is adopted by the parties as if presented at the trial of this cause.

2. If Chicago Police Sergeant Monroe Vollich were called to testify, he would testify that on August 8, 1976, he responded to a radio message concerning a robbery in progress; that as he arrived at the scene, he observed defendant Herman L. Raddatz with what appeared to be a gun in his hand;

that he ordered Raddatz to drop the gun; that Raddatz appeared to do so; that Raddatz was placed under arrest for unlawful use of a weapon, a violation of Illinois law; and that subsequent to the arrest of Raddatz he recovered from the area where Raddatz had been standing a Titan, .25 caliber, semi-automatic pistol, serial number A21803 which Sergeant Vollich subsequently inventoried with the Chicago Police Department.

3. That Special Agents Paul G. Russell and Richard S. McCulloch, if called to testify respecting their interviews with defendant Raddatz on November 19, 1976 and January 12, 1977 (which interviews are more fully described in their testimony at the hearing on defendant's motion to suppress) would testify that defendant made statements to them as follows:

a. *November 19, 1976:* "Raddatz stated he remembered the night of August 8, 1976, when he was arrested by Sergeant Vollich and Officer Bach. He stated he and his wife had gone to his father's residence at 2514 North Kedzie and he ran into James D. Batson. He stated he had had trouble with Batson before and that they became involved in a fight. He stated he took a pistol from Batson and was pistol whipping him when the police arrived."

b. *January 12, 1977:* "On January 12, 1977, Raddatz was again interviewed and he retracted his statement of November 19, 1976. Raddatz said that he had not taken the subject firearm from James D. Batson on August 8, 1976, as he had previously

stated, but that he had received the subject firearm from his half brother, Art Raddatz, on or about August 1, 1976 to August 8, 1976, in Chicago, Illinois."

4. If called to testify as a witness in this case, a records custodian from the Firearms Import and Export Company, Miami, Florida would testify that his company's records, kept in the ordinary and regular course of its business, indicate that a Titan, .25 caliber, semi-automatic pistol, serial number A21803, was manufactured in Miami, Florida.

5. The following exhibits would be offered into evidence:

(1) Titan, .25 caliber, semi-automatic pistol, serial number A21803;

(2) Eight certified copies of prior felony convictions of Herman L. Raddatz;

(3) Business records, indicating that the pistol above was manufactured in Florida;

(4) Certified copy of an ATF records search, indicating that no records exist, showing Herman L. Raddatz to be relieved from

prior felon disabilities regarding receipt of firearms. (Attached hereto.)

/s/ Herman L. Raddatz,
HERMAN L. RADDATZ
Defendant

/s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
Attorney for Defendant
Raddatz

THOMAS P. SULLIVAN
United States Attorney

/s/ Jeffrey J. Kent
JEFFREY J. KENT
Assistant U.S. Attorney

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

77 CR 325

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN RADDATZ, DEFENDANT

REPORT AND RECOMMENDATION

TO THE HONORABLE GEORGE N. LEIGHTON, one of the Judges of the United States District Court for the Northern District of Illinois.

On June 17, 1977, pursuant to Local Rules, this matter was assigned to my calendar.

I have considered all pleadings related to this matter and transmit herewith the following:

1. The Court File;
2. Transcript of Proceedings at Hearing held on July 26, 1977 through July 28, 1977;
3. Defendant's Proposed Findings of Fact and Memorandum in Support of his Motion to Suppress; and,
4. Government's Proposed Findings of Fact and Law Regarding Suppression Hearing Conducted in the Magistrate's Court Between July 26, 1977, and July 28, 1977.

RECOMMENDATION:

The three statements sought to be suppressed by the defendant occurred on August 8, 1976, November 19, 1976, and January 12, 1977.

Statement of August 8, 1976

From the defendant's own assertion, the admissibility of this statement depends upon the credibility of the testimony given by the Chicago Police Officer. I find that the testimony of Officer Monroe Vollick is credible, that the arrest was legal because made upon probable cause; and that defendant was advised of his constitutional rights at the time. Having waived his constitutional rights, the aforesaid statement is voluntary and is admissible.

Statement of November 19, 1976

I find that the Miranda warning was given and the statement made by defendant was voluntary. He was not in custody at the time; the statement was given at his home after being advised of his constitutional rights prior to making any statement.

Statement of January 12, 1977

I find that Raddatz initiated the voluntary making of the statement by telephoning the office of Alcohol, Tobacco and Firearms, stating that he wished to make a further statement. Despite the non-custodial setting, Agent Russell advised defendant of

his constitutional rights, prior to the defendant making said statement.

From the testimony I find that there is no merit to the defendant's Motion to Suppress; that the defendant Raddatz, who has eight prior felony convictions (TR 123-25), knowingly and intentionally waived his constitutional rights and thereafter provided statements on November 19, 1976, and January 12, 1977.

I find the testimony of the Alcohol, Tobacco and Firearms agent more credible, with reference to other matters raised by defendant; I find that Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated.

Accordingly, I respectfully recommend that this Court deny defendant's Motion to Suppress and that the Court adopt the Government's Proposed Findings of Fact as the Findings of the District Court.

Respectfully submitted,

/s/ Carl B. Sussman
CARL B. SUSSMAN
United States Magistrate

Dated: November 1, 1977

cc: Thomas P. Sullivan
United States Attorney

Jeffrey J. Kent
Assistant United States Attorney

Joan Gottschall
Attorney for Defendant
Federal Defender Program

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Supreme Court, U.S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 77 CR 325

UNITED STATES OF AMERICA

v.

HERMAN RADDATZ

DOCKET ENTRIES

DATE	PROCEEDINGS
3-31-77	Filed Indictment. (JS-2) hd
3-31-77	Order Indictment returned in open court; to issue Bench warrant and set bond at $25,000.00 CASH—PARSONS, C. J. hd
3-31-77	Issued Bench Warrant with copy of the Indictment to the United States Marshal. hd
4-14-77	Enter order dated 4/13/77: Defendant with counsel acknowledges receipt of the indictment waives formal reading and enters a plea of not guilty Hearing on motion to reduce bond is set for Thursday, April 14, 1977 at 9:00 a.m. LEIGHTON, J Mailed notices 4/14/77 pam
4-14-77	Filed Financial Affidavit. pam
4-14-77	Filed Appearance of Joan B. Gottschall as attorney for defendant. pam
4-14-77	Order appointing counsel. DRAFT LEIGHTON, J pam
4-14-77	Filed Appearance Bond in the amount of $25,000.00 $500.00 deposit with the clerk of the Court, receipt number 260741. pam
4-15-77	Enter Order Dated 4/14/77:

DATE PROCEEDINGS

It is ordered that the defendant's bond is set in the amount of $25,000.00 to be secured by the deposit of $500.00. The Defendant is to sign his bond for the entire amount of $25,000.00 and the bond is further to be signed by the following consignatories to the extent indicated. Leo Congenie, $1,000.00, Vince Marting—$1,000.00 and Dolores Radditz, $500.00. Conditions of bond being that he possess no firearms or dangerous weapons and the he refrain from all acts of violence; and that he enroll and participate in a drug abuse program, pending trial, as directed by the pre trial service office. DRAFT—LEIGHTON, J Mailed Notices 4/15/77. pam

4-15-77 Enter Order Dated 4/14/77:

Joan B. Gottschall a member of the Federal Defender Panel is appointed to represent the defendant herein. The parties are to hold their 22.04 conference on or before April 22, 1977. Pre trial motions to be filed on or before May 4, 1977. The Government's answer thereto to be filed on or before May 11, 1977. Cause is set for a report on status on May 13, 1977 at 10:00 a.m. LEIGHTON, J
Mailed Notices 4/15/77 pam

4-21-77 Filed Bench Warrant returned executed on 4/12/77 as to defendant Raddatz. pam

5-4-77 Filed notice of filing, motion to suppress statements, motion to strike surplusage from indictment and memorandum in support thereof. pam

5-4-77 Filed motion to dismiss the indictment and memorandum in support thereof. pam

5-16-77 Enter order dated 5/13/77:

The government is granted to May 20, 1977 in which to file their answer to the defendant's pre-trial motion. And cause is continued to May 27, 1977 to set ruling date on pretrial motions. The Appearing of the defendant is waived on said date. LEIGHTON, J
Mailed notices 5/16/77 pam

DATE PROCEEDINGS

5-25-77 Filed Government's response to defendant Herman Raddatz motion to strike surplusage from indictment.

5-25-77 Filed Government's response to defendant's motion to dismiss the indictment. tjf

5-27-77 Enter order dated May 27, 1977:

The reply of the defendant to Government's answer to pretrial motions shall be filed this date. The pre trial motions are under advisement and cause is continued to June 9, 1977. At 10:00 a.m.—LEIGHTON, J.
Mailed notices 5-27-77 tjf

5-27-77 Filed defendant's reply to government's response to motion to dismiss the indictment. tjf

6-17-77 Enter order dated June 16, 1977:

Cause is continued to June 20, 1977 at 10:00 a.m.—LEIGHTON, J.
Mailed notices 6-17-77 tjf

6-17-77 (a) Enter order dated June 9, 1977:

The above-captioned case is presently pending on my calendar. I recommend that it be referred to a magistrate of this court for a hearing on motion to suppress; and pursuant to 28 U.S.C. § 636(b)(1)(B), submit proposed findings and recommendations for disposition.—LEIGHTON, J.

(b) Enter order dated June 10, 1977:

It is hereby ordered that the above-captioned case be referred by lot to a Magistrate of this Court in accordance with the Rules.

Parsons, JC.—FOR THE EXECUTIVE COMMITTEE
Mailed notices 6-17-77 (reassigned to Magistrate Sussman) tjf

DATE	PROCEEDINGS

6-22-77 Enter order dated June 20, 1977:

Cause is continued to June 24, 1977 at 10:00 a.m. for ruling on pre-trial motions.—LEIGHTON, J.
Mailed notices 6-22-77 tjf

6-29-77 Enter order dated June 24, 1977:

This cause is continued to July 1, 1977 at 10:00 a.m. for status hearing.—LEIGHTON, J.
Mailed notices 6-29-77 tjf

7-6-77 Enter order dated July 1, 1977:

Cause called and status heard. Cause is continued to July 15, 1977 at 10:00 a.m. for further status hearings. —Leighton, J.
Mailed notices 7-6-77 tjf

7-6-77 Enter order dated July 1, 1977:

the cause is called for status hearing. Counsel for defendant responded. No one appeared on behalf of the United States. The motion to suppress is accordingly set for hearing on July 12, 1977, at 9:00 a.m. and counsel of record are required to attend.—Sussman, M.
Mailed notices 7-6-77 tjf

7-11-77 Filed Amended motion to suppress statements. mav

7-13-77 Enter order dated July 11, 1977:

Motion for leave to amend motion to suppress statements is granted. LEIGHTON J.
Mailed notices 7-13-77. mav

7-15-77 Enter order dated July 12, 1977:

Defendant's motion to suppress is called for hearing. Defendant is represented by Joan Gottschall of the Federal Defender Program. AUSA Kent moves for a continuance to July 26, 1977, which is the first available date when the Government's witnesses will be available to testify The motion for a continuance is granted and the hearing is hereby set for 8:45 a.m. on July 26, 1977. SUSSMAN M.
Mailed notices 7-14-77. mav

DATE	PROCEEDINGS

7-18-77 Filed defendant's objection to referral of hearing on motion to suppress to Magistrate. tjf

8-1-77 Enter order dated July 15, 1977:

Cause is continued to September 13, 1977 at 10:00 a.m. for a status hearing—LEIGHTON, J.
Mailed notices 7-25-77 tjf

8-1-77 Enter order dated July 28, 1977:

The parties, having rested their case in the hearing on defendant's motion to suppress, subject to a review within 10 days of certain materials by the United States, as agreed to by the parties, IT IS HEREBY ordered that each party submit proposed findings of fact and conclusions of law within 15 days of receipt of the transcript of proceedings of said hearing. The court will set a date certain for oral argument.—Sussman M.
Mailed notices 8-1-77 tjf

9-23-77 Enter order dated September 13, 1977:

Cause is continued to October 13, 1977 at 10:00 a.m. for a further status hearing.—LEIGHTON, J.
Mailed notices 9-13-77 hd

9-27-77 Enter order dated Sept. 23, 1977:

Enter order to extend time to file proposed findings and conclusions of law to and including Oct. 4, 1977. On motion of defendant.—Sussman, M.
Mailed notices 9-27-77 tjf

10-4-77 Filed defendant's motion to extend the time for filing brief in support of motion to suppress.

10-7-77 Enter order dated Oct. 4, 1977:

Defendant's motion for an extension of time granted time extended to 10-12-77.—Sussman, M.
Mailed notices 10-6-77 tjf

DATE	PROCEEDINGS

10-17-77 Enter order dated Oct. 12, 1977:

Motion to file memorandum in excess of 15 pages granted. —Sussman, M.
Mailed notices 10-14-77 tjf

10-18-77 Enter order dated October 13, 1977:

Status hearing held. Cause is continued to October 26, 1977 for further status hearing. Presence of the defendant is waived on this date. LEIGHTON, J.
Mailed notices 10-18-77 hd

10-25-77 Filed government's proposed finding of fact and law regarding suppression hearing conducted in the Magistrate's court between July 26, 1977 and July 28, 1977. tjf

11-3-77 Enter order dated Oct. 26, 1977:

Status hearing held. Cause is continued to November 16, to enable the magistrate to schedule a hearing on the defendant's pre-trial motion.—Leighton, J.
Mailed notices 11-2-77 tjf

11-7-77 Enter order dated November 3, 1977:

It is hereby ordered that the case above enumerated by and that hereby assigned to the calendar of Judge Nicholas J. Bua, effective 4 November 1977 subject to the terms and provisions of the General Order of the Executive Committee entered 2 November 1977. FOR THE EXECUTIVE COMMITTEE—Mc GARR, J hd

11-7-77 Enter order dated November 1, 1977:

Report and recommendation transmitted to Honorable George N. Leighton, United States District Court Judge. —SUSSMAN, Mg.
Mailed Notice 11-2-77 hd

11-7-77 Enter order dated November 1, 1977:

All matters relating to the referral of the above enttiled cause having been resolved the cause is returned to the assigned Judge for further proceedings.—SUSSMAN, Mg.
Mailed notices 11-2-77 hd

DATE	PROCEEDINGS

11-10-77 Enter order dated Nov. 4, 1977:

Excludable delay due to hearings on pre-trial motions began on 5-4-77 and ended on 5-27-77.—Bau, J.
Mailed notices 11-7-77 tjf

11-16-77 Enter order dated No. 4, 1977:

Excludable delay while defendant motion under advisement, began on 5-27-77 and ended on 6-26-77.—Bau, J.
Mailed notices 11-7-77 tjf

11-16-77 Enter order dated Nov. 10, 1977:

Status hearing and to set for trial set for Nov. 16, 1977 at 9:30 a.m.—Bau, J.
Mailed notices 11-11-77 tjf

11-21-77 Enter order dated 11/16/77:

Status hearing held. Status hearing continued to 12/8/77 at 3:30 p.m.—Bua, J.
Mailed notices 11/21/77 c

12-14-77 Enter order dated 12/8/77:

Defendant's motion objection to the referral to a magistrate of the motion to suppress will be denied and the motion to suppress the statements will also be denied. The Court accepts the recommendation of the magistrate and adopts the government's proposed findings of fact as the court's findings. (draft) Defendant's motion to dismiss is denied. Ruling on defendant's motion to strike surplusage from indictment is withheld. Trial is set for December 15, 1977 at 10:00 a.m.—Bua, J.
Mailed notices 12/13/77 c

12-13-77 Filed defendant's motion for discovery.

12-13-77 Filed defendant's motion for leave to file objections to the Magistrate's recommended findings of fact and for reconsideration of defendant's motion to suppress. tjf

DATE	PROCEEDINGS

12-15-77 Enter order dated Dec. 13, 1977:

Defendant granted leave to file objections to the Magistrate's recommended findings of fact on or by Dec. 15, 1977.—Bua, J.
Mailed notices 12-15-77 tjf

12-15-77 Filed defendant's objections to the Magistrate's recommended findings of fact and conclusions of law. tjf

12-16-77 Enter order dated Dec. 15, 1977:

Trial is reset to Dec. 27, 1977 at 10:00 a.m.—Bua, J.
Mailed notices 12-16-77 tjf

12-29-77 Enter order dated 12/27/77:

Trial is reset to 12/28/77.—Bua, J.
Mailed notices 12/29/77 c

12-28-77 Filed waiver of trial by jury. c

1-5-78 Enter order dated 12/28/77:

Trial begins—bench. Filed waiver of trial by jury. Stipulation will be filed and taken under advisement. Trial ruling set for 1/26/78 at 9:30 a.m.—Bua, J.
Mailed notices 1/5/78 c

1-12-78 Filed stipulation. tjf

1-24-78 Filed government's certificate of service.

1-24-78 Filed government's motion to reconsider this court's construction of Title 18, United States Code, Section 922(h). tjf

2-6-78 Enter order dated January 26, 1978

Defendant's objections to the Magistrate's findings is overruled. Defendant to respond to government's motion to reconsider construction of 18 USC 922(h) by or on January 31, 1978. Trial ruling is reset to February 6, 1978 at 9:30 AM.—Bua, J
Mailed notices 2-6-78. pwm

DATE	PROCEEDINGS

2-3-78 Filed defendant's supplemental points and authorities concerning the construction of 18 U.S.C. § 922(h).

2-7-78 Enter order dated 2/6/78:

Defendant's motions to dismiss the indictment and motion to strike surplusage from the indictment are denied. The court finds the defendant guilty count 1. Court enters judgment of guilty—count 1. (draft) Order cause referred to probation department for pre-sentence investigation. Sentencing set for 3/14/78 at 9:30 am.—Bua, J.
Mailed notices 2/7/78 c

3-6-78 Enter order dated 3-2-78:

Sentencing is reset to March 15, 1978 at 9:30 a.m.
BUA, J er
Mailed notices 3-6-78.

3-16-78 Enter order dated 3-15-78:

It is adjudged that the defendant is committed to the custody of the Attorney General for imprisonment for a term of FIVE (5) YEARS and for a study as described in 18 U.S.C. § 4205(d), the results of such study to be furnished this court within three months unless the court grants further time not to exceed three months, whereupon the defendant shall be returned to this court and the sentence of imprisonment herein imposed shall be subject to modification in accordance with 18 U.S.C. § 4205(c). The Court recommends said study be conducted at the Metropolitan Correctional Center.
(DRAFT)—BUA,J er

Status hearing is set for June 15, 1978 at 9:30 a.m.
BUA,J er
Mailed notices 3-16-78

3-15-78 Filed notice of Appeal regarding order dated 3-15-78. er

DATE	PROCEEDINGS

3-16-78 Forwarded copy of Notice of Appeal, copy of docket entries, and information sheet to the U.S.C.A., 7th Circuit. er

3-16-78 Issued Judgment and Probation/Commitment order, 3 copies to Probation and 2 copies to U.S. Marshal. er

3-21-78 Certified and transmitted to U.S.C.A.—7th Circuit complete record on appeal consisting of 1 volume of pleadings. er

3-20-78 Filed judgment and probation/commitment order returned executed by U.S. Marshal on March 15, 1978 to Metropolitan Correctional Center at Chicago, Ill. er

3-28-78 Enter order dated March 23, 1978

IT IS HEREBY ORDERED that the Clerk of the Court is to refund defendant's bond security in this case to the persons and in the amounts indicated in this Court's order of April 14, 1977 setting bond in this case, a certified copy of which is attached hereto. That order specifies that security was posted by Leo Congenie in the amount of $1,000.00, by Vince Martin in the amount of $1,000.00, and by Dolores Raddatz in the amount of $500.00 (DRAFT)—Bua,J
Mailed notices 3-28-78. pwm

3-27-78 Filed Certified copy of order from USCA dated March 22, 1978: Record on appeal will be filed with the Clerk on or before April 19, 1978. pwm

DATE	PROCEEDINGS

4-11-78 Enter order dated 4-10-78:

The order of this Court entered on March 23, 1978 respecting the return of bond security in this case is hereby vacated. It is hereby ordered that the $500.00 bond security posted in the above-captioned case be returned to the individual whom the records of this Court indicate posted the bond security, LEO CONGINIE. DRAFT, BUA,J er
Mailed notices 4-11-78

4-17-78 Filed transcript of proceedings dated July 26, 1977 held before Magistrate Carl B. Sussman. er

11-12-77 Filed Defendant's proposed findings of fact and memorandum in support; of his motion to suppress. er

4-19-78 Filed clerk's file copy of transcripts taken before Judge Bua on 1-26-78, 2-6-78 and 3-15-78.

4-20-78 Transmitted supplement to the record on appeal consisting of one volume of transcripts. eg

4-25-78 Filed transcript of proceedings dated 1-11-77 before Judge Leighton. er

4-27-78 Transmitted supplement to the record on appeal consisting of 1 vol. of transcripts. er

6-26-78 Enter order dated June 15, 1978

The defendant having been convicted upon his plea of not guilty of the offense of receiving a firearm which had been transported in interstate commerce, after having been convicted of a felony and having on March 15, 1978 having been committed to the custody of the Attorney General pursuant to 18 USC § 4205(c) for imprisonment for a term of five (5) years (the maximum period) and for a study as described in 18 USC § 4205 (d), and the defendant having been returned to this Court; and the Court having now received and considered the report of such study, IT IS ORDERED AND

DATE	PROCEEDINGS

ADJUDGED that the sentence of imprisonment heretofore imposed be affirmed, and on condition that the defendant be confined in the Metropolitan Correctional Center for a period of six months, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for a period of 4½ years to commence upon the defendant's release from confinement, upon the following terms and conditions. The court recommends that defendant continue receiving psychological services begun during the period of observation and study. The court further recommends that defendant be referred to Operation DARE for placement in employment and should employment be secured during his period of confinement he may participate in a work release program. (DRAFT)—Bua, J

Mailed notices 6-16-78. JS-3 pwm

6-19-78 Issued 2 certified copies of judgment and probation/commitment order to US Marshal and 3 to probation. pwm

8-2-78 Clerk's file copy of transcript of proceedings, had before Judge Bua on November 16, 1977. Filed by Official Court Reporter. One volume. sa

8-3-78 Transmitted supplement to the record on appeal consisting of one volume of transcripts. sa

10-30-78 Filed certified copy of order from U.S.C.A., 7th Circuit, dated October 26, 1978, Docket No. 78-1350, ORDERED: The clerk of the district court is directed to certify and transmit to the clerk of this court, on or before October 30, 1978, the district court order of June 15, 1978 modifying the defendant-appellant's sentence, previously imposed on March 15, 1978. sa

10-31-78 Certified and transmitted supplement to the record on appeal to the U.S.C.A., 7th Circuit consisting of district court order of June 15, 1978 modifying the defendant-appellant's sentence previously imposed on March 15, 1978. sa

DATE	PROCEEDINGS

6-7-79 Filed 6/4/79 Opinion number 78-1350. ar

6-7-79 Filed 6/4/79 certified copy of order from the U.S.C.A. 7th. Cir. dated February 6, 1979. JUDGMENT of the U.S.D.C. is REVERSED AND REMANDED for a new hearing on the motion to suppress before the District Court Judge, in accordance with the opinion of this court filed this date.—Walther Cummings, C.J. ar

6-7-79 Record returned 6/4/79 from the U.S.C.A. 7th. Circuit consisting of one volume of pleadings, four volumes of transcripts, one envelope supplemental pleadings, and on envelope DC modified sentencing order. ar

10-26-79 Filed 10/23/79 Letter dated 10/5/79 from Miss June Hoffman, Assistant Clerk, Supreme Court of the United States, Washington, D.C. requesting transmittal of entire record in this case. ab

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGE LEIGHTON

No. 77 CR 325

UNITED STATES OF AMERICA

v.

HERMAN L. RADDATZ

Violation: Title 18, United States Code,
Section 922(h)(1)

The MARCH 1977 GRAND JURY charges:

In or about early August, 1976, at Chicago, in the Northern District of Illinois, Eastern Division,

HERMAN L. RADDATZ,

defendant herein, having been convicted in Cook County, Illinois, on July 16, 1964, for the crimes of attempted murder, aggravated battery and theft (over $100.00); having been convicted on May 10, 1967, twice for the crime of armed robbery and once for the crime of attempted robbery; and having been convicted on August 17, 1972, for the crimes of aggravated battery and armed robbery, all crimes punishable by imprisonment for terms exceeding one year, knowingly did receive a firearm, namely, one Titan .25 caliber, semi-automatic pistol, serial number A21803, which firearm had been shipped and transported in interstate commerce;

In violation of Title 18, United States Code, Section 922(h)(1).

A TRUE BILL:

_____

Foreman

_____

United States Attorney
JJK:ja

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 CR 325

UNITED STATES OF AMERICA

v.

HERMAN RADDATZ

GOVERNMENT'S PROPOSED FINDINGS OF FACT AND LAW REGARDING SUPPRESSION HEARING CONDUCTED IN THE MAGISTRATE'S COURT BETWEEN JULY 26, 1977 AND JULY 28, 1977

Now comes the UNITED STATES OF AMERICA, by THOMAS P. SULLIVAN, United States Attorney for the Northern District of Illinois, and, in response to the Magistrate Court's request for proposed findings of fact and law, states as follows:

1. Pursuant to Judge George N. Leighton's court order, a hearing was conducted in this Magistrate's Court from July 26, 1977 through July 28, 1977 regarding whether or not statements made by defendant Herman Raddatz should be suppressed.

2. Upon the conclusion of the hearing, this Court asked the government and the defense to submit proposed findings of fact and law.

3. Based upon the evidence received, the credibility of the witnesses, and the state of the law, the government proposes the following findings to this court:

a. The Chicago Police had probable cause to arrest Raddatz on July 8, 1976 when, in responding to a radio message regarding a robbery in progress, they observed Raddatz, whom they knew to have prior convictions for robbery, with a loaded pistol in his hand, standing over a James Batson, who was bleeding from the head. (Tr. 33, 36-37).

b. Chicago Police Officer Monroe Vollich advised Raddatz of his constitutional rights to counsel and to remain

silent on August 8, 1976 after he was arrested. (Tr. at 4-5, 29-30).

c. Raddatz' initial statement on August 8, 1976 that he hit Batson was volunteered by Raddatz while the police were questioning Batson. (Tr. at 13-14, 26-27).

d. The statements made by Raddatz on August 8, 1976 were voluntary. They were made after his lawful arrest. In addition, they were made either after he had been advised of his constitutional rights and waived those rights, or they were volunteered before being advised of his rights but not in response to police interrogation.

e. Raddatz was not in custody on either November 19, 1976 or January 12, 1977 when he made additional statements to federal agents. Therefore, there was no need for federal agents to advise him of his constitutional rights to counsel and to remain silent on these dates since the Supreme Court has recently enuciated a "custodial" rather than a "focal" test to determine when a person must be advised of his constitutional rights. *Beckwith* v. *United States*, 96 S. Ct. 1612 (1977). Raddatz' November 19, 1976 statement was given at his home. Raddatz' January 12, 1977 statement was given at the offices of the Bureau of Alcohol, Tobacco, and Firearms (ATF) after he called those offices and stated that he wished to make a further statement. Despite the non-custodial setting, Agent Paul Russell of the Bureau of Alcohol, Tobacco and Firearms (ATF) advised Raddatz of his constitutional rights to counsel and to remain silent prior to Raddatz' making any statements on November 19, 1976 and January 12, 1977. (Tr. at 33-38; Exhibit 1) After being advised of his constitutional rights, Raddatz, who has eight prior felony convictions (Tr. 123-25), knowingly and intentionally waived these rights and thereafter provided statements on November 19, 1976 and January 12, 1977.

f. Federal agents never advised Raddatz that charges against him would be dismissed if he would cooperate with the federal government (Tr. at 160-62).

g. Raddatz was told by ATF agents that any cooperation which he provided would be brought to the attention

of the United States Attorney's Office. (Tr. at 165, 222-23)

h. The only apparent effort by Raddatz to cooperate occurred on January 12, 1977, after he made his final statement to federal agents, when he directed ATF Agent Richard McCulloch to a house, which he stated was a place where firearms were traded. Efforts by Agent McCulloch to confirm Raddatz' representations were unproductive. Raddatz never attempted to arrange a transaction for the purchase of firearms nor did he attempt to introduce undercover agents to anyone unlawfully dealing in firearms. (Tr. at 199-203, 228-29, 234-39)

i. The statements made by Raddatz on November 19, 1976 and January 12, 1977 were voluntary.

WHEREFORE, the government moves that the Magistrate Court adopt its proposed findings of fact and law.

Respectfully submitted,

THOMAS P. SULLIVAN
United States Attorney

JJK:dr

SUPREME COURT OF THE UNITED STATES

No. 79-8

UNITED STATES, PETITIONER

v.

HERMAN RADDATZ

ORDER ALLOWING CERTIORARI

Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 304958 110

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-8

UNITED STATES OF AMERICA,

Petitioner,

vs.

HERMAN RADDATZ,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the respondent be allowed to proceed in forma pauperis before this Court.

Respondent was represented in the courts below by counsel appointed pursuant to the provisions of 18 U.S.C. §3006A.

Respectfully submitted,

Joan B. Gottschall
Jeffrey D. Colman
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Supreme Court, U.S.
FILED
AUG 3 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-8

UNITED STATES OF AMERICA,

Petitioner,

vs.

HERMAN RADDATZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Joan B. Gottschall
Jeffrey D. Colman
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-8

UNITED STATES OF AMERICA,

Petitioner,

vs.

HERMAN RADDATZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent respectfully prays that the petition for a writ of certiorari be denied.

QUESTION PRESENTED

When objections are made to a magistrate's recommended determination of a motion to suppress and an assessment of the credibility of witnesses is crucial to the resolution of dispositive factual issues, can the district judge, consistently with due process, decide the motion without seeing or hearing any witnesses?

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III of the United States Constitution provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. The Fifth Amendment to the United States Constitution provides, in addition to the portion quoted in the petition for certiorari:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

Respondent was prosecuted for a violation of 18 U.S.C. 922(h). Statements he had made to two agents of the Bureau of Alcohol, Tobacco and Firearms were needed by the Government to prove essential elements of its case. Prior to trial, respondent moved to suppress these statements on the grounds that they were involuntary and obtained in violation of his Fifth Amendment rights. The district judge, over objection, referred the motion to a magistrate for hearing.

At the hearing before the magistrate, inconsistent testimony concerning critical events was given by respondent and the two agents.[1/] An assessment of the credibility of these witnesses was determinative of the motion. The parties submitted conflicting proposed findings of fact. The magistrate recommended that the Government's proposed findings of fact be adopted and wrote a brief, conclusory report in which he stated that he found the agents "more credible" than respondent.

Without hearing any testimony, the district court adopted the Government's proposed findings of fact, overruled respondent's objections and denied the motion to suppress. There being no contested issues of fact apart from those involved in the motion to suppress, respondent was tried by the court on an evidentiary stipulation. His conviction followed.

The Court of Appeals for the Seventh Circuit reversed respondent's conviction and remanded the case for a hearing on the motion to suppress before the district court at which the court could assess the credibility of the witnesses. The court of appeals thoroughly reviewed the record which had been before the district court and concluded that "the truth cannot be derived from this written record without an intolerably high margin of error . . . ." 592 F.2d at 984. The court held that because of the importance of credibility to the decision of this motion to suppress, the district court could not reliably fulfill its statutory responsibility to make a de novo determination of the motion without holding a hearing on contested factual issues. 592 F.2d at 986.

REASONS FOR DENYING THE WRIT

The court of appeals' decision was narrow in scope and carefully tailored to the facts of this case. The court upheld the constitutionality of the Magistrates Act's provisions permitting magistrates to conduct hearings on motions to suppress. It did not hold that de novo review, as required by the Magistrates Act, invariably requires the hearing of evidence by the district court. See 592 F.2d at 982 n.4. Rather, noting that "Congress did not require the trial court to determine this case on the basis of a written record alone," the court held only "that the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case where credibility is crucial to the outcome." 592 F.2d at 986 (emphasis added).

The court of appeals' decision is in full accord with principles of due process repeatedly stated by this Court. Contrary to the Government's contention, the court of appeals'

1/ The Government has omitted from its statement of the case the contradictions between the testimony given by each of the agents, the internal inconsistencies in their testimony and many of the details upon which the agents corroborated respondent's testimony. These problems in the evidence are described in the opinion of the court of appeals, reported at 592 F.2d 976, 977-979.

holding does not create a conflict among the circuits. Moreover, the legislative history indicates that the court of appeals' holding is consistent with the expectations of the framers of the Magistrates Act.

The standards for the exercise of a trial judge's discretion to hear evidence himself in deciding a motion to suppress initially heard by a magistrate can best be defined by district courts and courts of appeals as they gain experience working on a case-by-case basis with the actual records generated by magistrates.

I.

INTERVENTION BY THIS COURT IN ITS SUPERVISORY CAPACITY IS NOT WARRANTED

In its statement of the Question Presented and throughout its petition, the Government implies that the presence of crucial issues of credibility in this case was not essential to the court of appeals' holding. (Pet. at 2, 10.) The Government is in error. The court of appeals squarely upheld the constitutionality of the provisions of the Magistrates Act which permit magistrates to conduct hearings on motions to suppress. But it held in addition, as a matter of due process, that when a motion to suppress raises critical issues of credibility that cannot be determined from a cold record, the district judge must exercise his statutory authority to hear relevant testimony himself. 592 F.2d at 986. This holding is unassailably correct. This Court has repeatedly stated that even outside the context of judicial proceedings, where credibility is crucial to the resolution of disputed factual issues, the opportunity to observe the witnesses is

indispensable. See, e.g., Califano v. Yamasaki, No. 77-1511 (June 20, 1979), slip op. at 13-14; Goldberg v. Kelly, 397 U.S. 254, 269 (1970). See also Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); United States v. Oregon State Medical Society, 343 U.S. 326, 339 (1952); United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949).

The Government argues that the factfinding method employed by the district court in this case is adequate since the procedural requirements for a suppression hearing are "less elaborate" than the procedural requirements for the trial on the issue of guilt. (Pet. at 15.) This argument is not well-taken. Nothing in the authorities cited by the Government sanctions a compromise in the integrity of the factfinding process even remotely comparable to an assessment of credibility from a cold record.[2/]

The Government's theory is that the judge need not find the facts with the level of confidence he would have were he the factfinder of first instance because the magistrate has seen and heard the witnesses. This theory ignores the Magistrates Act's express requirement that the district court make a de novo determination of portions of the magistrate's report or findings to which objection is made. 28 U.S.C. §636(b)(1)(B). Section

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2/ In Lego v. Twomey, 404 U.S. 477, 488-489 (1972), this Court expressly noted that the reliability of suppression rulings was not compromised by use of a preponderance of the evidence standard. The standard of proof determines where the inevitable risk of error in litigation will fall. It does not, like a procedure which deprives the decisionmaker of the source of evidence most relevant to his determination of credibility, vastly expand the risk of error. Similarly, in United States v. Matlock, 415 U.S. 164, 175-177 (1974) and McCray v. Illinois, 386 U.S. 300, 307-308, 313 (1967), this Court upheld the application of traditional evidentiary practices in part because it found that they did not impair the reliability of the factfinding process.

636(b)(1)(B) makes the district judge - not the magistrate - the decisionmaker. The court of appeals has done nothing more than uphold this clear statutory mandate and require that it be exercised, where credibility is critical, in compliance with established principles of due process.

II.

THE ALLEGED CONFLICT AMONG THE CIRCUITS IS ILLUSORY

The Government asserts that the decision of the Seventh Circuit conflicts with decisions of the Fifth Circuit in United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979), and the Ninth Circuit in Campbell v. United States District Court, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 979 (1974). An examination of these cases shows that neither addressed the problem of credibility on which the decision of the court of appeals in this case was premised.

The Seventh Circuit's decision is limited to motions to suppress involving factual disputes "where credibility is crucial to the outcome." 592 F.2d at 986. The motion to suppress in Whitmire was resolved solely on a question of law: whether customs agents were justified in boarding a docked vessel on the basis of facts not amounting to probable cause. 595 F.2d at 1315-1316. There is no indication in the Fifth Circuit's opinion that there was any dispute as to the underlying facts, let alone a dispositive credibility conflict.

The Campbell case went to the Ninth Circuit on a petition for a writ of mandamus to restrain the reference of a motion to suppress to a magistrate. The case was thus decided without any factual record. 501 F.2d at 200, 207. The due process problem that arises when credibility is

critical to the determination of a motion was thus not present in that case and was not addressed by the court.3/

The Ninth Circuit confronted the issue of fact-finding under the Magistrates Act only later, in United States v. Bergera, 512 F.2d 391 (9th Cir. 1975). There, the district court, after record review of a suppression hearing before a magistrate, rejected the magistrate's recommendation that the motion to suppress be granted. The Ninth Circuit reversed, holding that the district court, unless it relies on the magistrate's assessment of the facts, must rehear the evidence to insure "that any decision on the facts will be the result of first-hand observation of witnesses and evidence." 512 F.2d at 393. Based on the same due process principles which guided the Seventh Circuit's decision here, Bergera prohibited a judge from entering an order inconsistent with a magistrate's recommendation unless the judge himself heard the evidence on the motion to suppress. 512 F.2d at 392.

One year after Bergera was decided, Congress enacted the Magistrates Act amendments which governed the reference in this case. In those amendments, Congress for the first time expressly required the district court to make a de novo determination of contested portions of the magistrate's report. The amendments stated clearly, contrary to Bergera, that whether or not he rehears any evidence, the judge is free to "accept, reject or modify" the findings or recommendations of the magistrate. 28 U.S.C. §636(b)(1)(B). As the Seventh Circuit observed, Congress' mandate that the judge make a de novo

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3/ The Ninth Circuit, while leaving the method of review of a magistrate's recommendation to the district judge's discretion, specifically provided that the judge had the power to recall witnesses if a credibility issue arose, 501 F.2d at 206, and suggested that his ability to do so would meet "the problem of the credibility of witnesses." 501 F.2d at 205.

determination of the motion is incompatible with the degree of deference Bergera required. 592 F.2d at 984 n.9.

The decision of the court of appeals in this case was limited to a particular kind of fact situation. Neither of the cases which the Government cites as in conflict with this decision involved the credibility problem which is the basis for the court of appeals' ruling.

III.

THE DECISION OF THE COURT OF APPEALS WILL NOT IMPOSE A SUBSTANTIAL ADDITIONAL BURDEN ON THE FEDERAL COURTS OR LESSEN THE IMPORTANCE OR USEFULNESS OF MAGISTRATES IN THE ADMINISTRATION OF JUSTICE

The Government contends that the decision of the court of appeals will impose a substantial, additional burden on the federal courts and diminish the role of magistrates in the administration of justice. In support of this contention, the Government cites statistics from the 1978 Annual Report of the Director of the Administrative Office of the United States Courts. The Report does not reveal, however, what percentage of the §636(b)(1)(B) matters shown by its statistics to have been handled by magistrates during 1978 involved evidentiary hearings, what percentage of those matters resulted in appeals to the judge on disputed factual issues or how often district judges heard evidence themselves in order to resolve factual disputes. The procedure required by the court of appeals here may already be the accepted practice in many districts. One informed commentator has stated, "In some specific instances it may be necessary for the judge to . . . recall witnesses . . . if, for example, the judge finds that there is a problem as to the credibility of a witness or witnesses in an adversary proceeding." Honorable Morey L. Sear, Supporting Personnel, in Proceedings of Seminar for Newly Appointed United States District Judges, 75 F.R.D. 89, 257 (Sept. 13-18, 1976). Two circuits

which had held, prior to this Court's contrary decision in Wingo v. Wedding, 418 U.S. 461 (1974), that magistrates could hold evidentiary hearings in post-conviction cases, also held that the district judge had to rehear evidence relevant to disputed factual issues. See O'Shea v. United States, 491 F.2d 774, 778 (1st Cir. 1974); Noorlander v. Ciccone, 489 F.2d 642, 648-649 (8th Cir. 1943).

The express requirement that the district court make a de novo determination of contested portions of a magistrate's report or findings was suggested by the Judicial Conference. H. R. Rep. No. 94-1609, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 6162. The purpose of the Judicial Conference's recommendation was to avoid any possible conflict with Article III of the Constitution. See Jurisdiction of United States Magistrates: Hearing on S.1283 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 35 (July 16, 1975) (Hereinafter, "Hearings"). The Judicial Conference anticipated that this provision would require some duplication of effort in particular cases but judged that as the quality of magistrate appointments improved and as the bar gained confidence in the system, the number of appeals would diminish. Hearings, supra, at 35-37. The Judicial Conference relied on time and experience to prove the effectiveness of the system, not depriving parties of their ability to obtain a determination of case-dispositive motions by an Article III judge. Their expectation that the Magistrates Act would nevertheless be a substantial aid to the federal courts belies the Government's contention that the decision of the court of appeals will have an untoward impact on the administration of justice which requires this Court's intervention.

Section 636(b)(1)(B) authorizes the district court to hear testimony itself. The legislative history indicates

that Congress anticipated that this authority might properly be exercised where witness credibility was at issue. See H. R. Rep. No. 94-1609, supra at 6163. The court of appeals has announced a holding focused directly and narrowly on this precise problem of witness credibility. The decision is consistent with the expectation of the Act's framers and properly construes the Act in the particular circumstances of this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

Joan B. Gottschall
Jeffrey D. Colman
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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No. 79-8

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 592 F.2d 976. The memorandum orders of the district court (Pet. App. 29a-34a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-26a) was entered on February 6, 1979, and a petition for rehearing was denied on May 4, 1979

(Pet. App. 27a-28a).[1] On May 31, 1979, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 3, 1979. The petition was filed on that date and was granted on October 1, 1979 (A. 18). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 636(b)(1)(B), which allows a district court to decide a suppression motion based on the record developed before a magistrate and the magistrate's proposed findings of fact and recommendations, violates the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time in time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

---

[1] The court of appeals issued a corrected copy of the order denying rehearing on May 22, 1979.

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

3. 28 U.S.C. 636(b)(1) provides in pertinent part:

> Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion * * * to suppress evidence in a criminal case * * *. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) * * *.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection

is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT

Following a bench trial on a stipulated record in the United States District Court for the Northern District of Illinois, respondent, a previously convicted felon, was convicted of unlawfully receiving a firearm, in violation of 18 U.S.C. 922(h).[2] Respondent was sentenced to five years' imprisonment, all but six months of which was suspended in favor of four and a half years' probation (Pet. App. 1a n.1).

1. Prior to trial, respondent moved to suppress several incriminating statements that he made to the Chicago police and agents of the Bureau of Alcohol, Tobacco and Firearms on the ground that the statements had been induced by promises of immunity in return for his cooperation. Over respondent's objection, the district court referred the suppression motion to a magistrate for an evidentiary hearing in accordance with the Federal Magistrates Act, 28 U.S.C. 636(b)(1)(B) (Pet. App. 4a).

[2] The parties agreed to allow the court to try respondent on the basis of the transcript of the suppression hearing, the statements of three witnesses, and the stipulations that respondent had previously been convicted of eight felonies and that the firearm in question had been manufactured in Florida (Pet. App. 35a-38a).

The evidence adduced at the suppression hearing showed that on August 8, 1976, two Chicago police officers arrested respondent, who was holding a pistol, for unlawful use of a weapon. Lying near respondent at the time of the arrest was another man, Jimmy Batson, who was bleeding from the left side of his head. Although Batson claimed that he had injured himself in a fall to the curb, respondent, after being informed of his constitutional rights, admitted that he had been fighting with Batson over a family matter and that he had brought a gun with him to protect himself in case any of Batson's friends tried to intercede on Batson's behalf.[3] In October 1976, the State of Illinois filed a charge against respondent arising out of the August 8 incident (Pet. App. 2a-3a, 35a-36a; Tr. 3-21, 28-29, 155-157, 249).

One month later, on November 19, 1976, Agents Paul Russell and Richard McCulloch of the Bureau of Alcohol, Tobacco and Firearms went to respondent's home to interview him about the pistol that was in his possession at the time of his arrest. The agents knew that respondent had previously been convicted of a felony. After informing respondent of his *Miranda* rights and ascertaining that he understood those rights, the agents told respondent that the gun

[3] At the hearing on the motion to suppress, respondent repeatedly denied making any statement to the arresting officers. One of the police officers, whose testimony was corroborated by the contemporaneous arrest report, specifically refuted this assertion, stating that respondent made the same incriminatory remarks both in the patrol car and then subsequently at the station house (Tr. 3-5, 14-16, 21, 31-32).

in question had at one time been owned by a West Virginia man who had been slain in an unsolved homicide. The agents sought to establish the gun's chain of possession since that time.[4] Respondent remarked that he had seized the pistol from Batson during the altercation on August 8 and that he did not know how Batson had obtained the weapon (Pet. App. 3a, 36a; Tr. 33-35, 38-42, 106-107, 110, 141, 174-178, 195-196, 213-215, 225-226).

In light of respondent's new explanation of how he had acquired the firearm, the agents asked him to describe and help them locate Batson. They told respondent that if he assisted them in finding Batson and tracing the gun they would inform the United States Attorney of his cooperation in the event he subsequently was prosecuted. Respondent replied that he would think about the matter, and he took Agent Russell's telephone number in case he decided to cooperate. Although respondent further claimed at the hearing that the agents promised that if he cooperated his impending indictment would be dismissed, both agents testified that no such promise was made (Pet. App. 5a-7a, 41a; A. 16-17; Tr. 41-42, 45, 161, 165, 179, 184-185, 196-197, 225, 236-237).

On January 12, 1977, respondent telephoned the agents and requested a meeting, explaining that he

[4] In addition, one of the officers testified that they also were "trying to determine venue; where [respondent] had come into receipt of the firearm * * *" (Tr. 225). See also Tr. 175-176, 215.

wanted to "straighten out something about the gun" (Tr. 179). The agents picked up respondent at his home and drove him back to their office. After the agents had again advised respondent of his constitutional rights, he retracted his prior story and admitted that he had not taken the gun from Batson on August 8, but in fact had obtained it from his half-brother approximately one week earlier. In addition, respondent describe in detail his knowledge of the prior history of the gun (Pet. App. 3a, 36a-37a; Tr. 36-38, 162, 179-180, 186-187, 197-199).[5]

At the suppression hearing, respondent admitted that his statement on November 19 was false and that on January 12 he had made the inculpatory statements attributed to him by the agents. He claimed, however, that he had incriminated himself on January 12 only after ascertaining that the agents' alleged immunity offer of November 19 was still in effect. In contrast, the agents testified that at no time was respondent offered immunity. Rather, the agents claimed that, following respondent's volunteered admissions, they asked him to assist in locating the persons who had previously possessed the firearm or any other persons involved in illegal gun dealing. Respondent indicated that he was willing to cooperate but that he needed money to make contact with gun sources. Accordingly, the agents gave respondent $10

[5] Respondent's half-brother had apparently purchased the gun from Bobby Mason in exchange for drugs. Mason, in turn, had obtained the gun from two persons who allegedly had stolen it somewhere in the South (Tr. 141-144, 179).

and then accompanied him on an unsuccessful attempt to purchase firearms (Pet. App. 3a, 5a, 36a-37a, 41a; A. 16-17; Tr. 103-108, 110-113, 123, 161-162, 179-180, 184-188, 197-202, 230, 236-237).[6]

Finally, on January 14, 1977, respondent returned to the ATF office, this time accompanied by his former wife and her children. Agent McCulloch and his supervisor informed respondent that his case had been referred to the United States Attorney for prosecution and that upon federal indictment the state charges against him would be dropped.[7] The ATF agents also discussed with respondent the possibility of his becoming an informant and again promised that any cooperation in that regard would be brought to the attention of the United States Attorney. Respondent stated that he was willing to work as an informant but that he had no money to travel about and pick up information. Agent McCulloch then gave respondent $50. However, respondent thereafter never produced any information, arranged any firearms transactions, or otherwise acted as an informant (Pet. App. 5a-6a; A. 17; Tr. 81-82, 121, 200-203, 207, 222-224, 237-238, 242-248).

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[6] Respondent claimed to be looking for a firearm dealer named Ochenbach. Respondent never set up a meeting between the agents and Ochenbach, however, and the agents were unable to discover whether Ochenbach actually existed (Tr. 199-201, 228-229).

[7] The state charges against respondent were dismissed on February 22, 1977 (Tr. 157, 249). Respondent's federal indictment was filed on March 1, 1977 (Pet. App. 3a).

2. After holding the evidentiary hearing and considering the parties' written and oral submissions, the magistrate filed proposed findings of fact and recommendations for the disposition of respondent's suppression motion in accordance with 28 U.S.C. 636 (b) (1) (B) and (C). The magistrate found that respondent knowingly, intelligently and voluntarily made inculpatory statements on three separate occasions, after having been informed of his *Miranda* rights on each occasion. Moreover, the magistrate expressly found that the testimony of the ATF agents was more credible than the story offered by respondent (who had previously been convicted of eight different felonies, including attempted murder and armed robbery), and he specifically rejected respondent's claim that the agents had promised him immunity from prosecution in return for his cooperation. Accordingly, the magistrate recommended that respondent's motion to suppress his statements of August 8 and November 19, 1976, and January 12, 1977, be denied (Pet. App. 39a-41a; Tr. 123-124).

3. Respondent filed objections to the magistrate's report with the district court. Pursuant to 28 U.S.C. 636 (b) (1) (C), the district court made a de novo determination of respondent's suppression motion based on a review of the transcript of the evidentiary hearing before the magistrate, the magistrate's proposed findings and recommendations, and the submissions of counsel. The court accepted the recommendation of the magistrate and expressly adopted the government's proposed findings of fact as its own (Pet.

App. 34a; A. 15-17). In particular, the court concluded that respondent had voluntarily chosen to make statements to the agents on the three days in question. It therefore denied the motion to suppress (Pet. App. 33a-34a).[8]

4. The court of appeals reversed and remanded (Pet. App. 1a-24a). The court first addressed respondent's statutory claims. It concluded that both the local court rules[9] and 28 U.S.C. 636(b)(1)(B) authorized the reference of respondent's suppression motion to a magistrate. In addition, in reliance on the language and legislative history of Section 636 (b), the court held that the trial judge's decision to deny respondent's motion to suppress after reviewing the transcript of the evidentiary hearing, the magistrate's report, and the submissions of the parties, but without hearing the live testimony itself, did not constitute an abuse of discretion under the statute (*id.* at 8a-14a).

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[8] The district court also denied respondent's motion to dismiss the indictment (Pet. App. 29a-31a). Respondent erroneously claimed that he should have been charged with violating 18 U.S.C. App. 1202(a), rather than Section 922(h), because the two statutes overlap and the former carries a lesser maximum penalty than the latter. See *United States* v. *Batchelder*, No. 78-776 (June 4, 1979).

[9] Local Magistrate Rule 1.01B(8) of the United States District Court for the Northern District of Illinois provides that a federal magistrate may assist the district court "in the conduct of pretrial proceedings" in a criminal case. The court of appeals construed this rule to cover the reference of a motion to suppress.

The court of appeals then addressed respondent's constitutional arguments based on Article III and the Due Process Clause. The court found that, because the statute requires the district court to make a de novo determination of any disputed portion of the magistrate's report or proposed findings or recommendation, reference of a suppression motion to a magistrate in accordance with Section 636(b)(1)(B) is not an unconstitutional delegation of judicial authority in violation of Article III (Pet. App. 14a). The court of appeals held, however, that where conflicting evidence is presented at a suppression hearing, the defendant is deprived of due process if the district court denies his motion to suppress without rehearing the controverted testimony. In the court of appeals' view, at least where "credibility is crucial to the outcome," a "district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case" (*id.* at 24a). The court therefore remanded for another suppression hearing to be conducted personally by the district court judge (*id.* at 15a-24a).[10]

SUMMARY OF ARGUMENT

I

As the court of appeals concluded, the pretrial proceedings in this case complied with the terms of the Federal Magistrates Act, 28 U.S.C. 631 *et seq.*

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[10] The court of appeals denied the government's petition for rehearing en banc on May 4, 1979, with two judges dissenting (Pet. App. 27a-28a & n.*).

The district court properly designated a magistrate to conduct an evidentiary hearing regarding respondent's suppression motion. Following a full and fair hearing, the magistrate credited the testimony of several government agents and recommended that respondent's motion to suppress be denied. Thereafter the district court made a de novo determination of the motion by reviewing the evidence adduced before the magistrate, the magistrate's report, and the submissions of the parties. The court concluded that respondent's inculpatory statements were made voluntarily, and it therefore rejected his suppression claim.

Nothing in the Act requires a district court to rehear testimony previously evaluated by the magistrate. Section 636(b)(1)(C) mandates that the court make a "de novo determination" of a pretrial motion, not that it conduct a second, redundant suppression hearing. Moreover, the legislative history confirms that the "use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). See also 122 Cong. Rec. 35182-35183 (1976) (remarks of Rep. Railsback). Indeed, construing "de novo determination" to mean "de novo hearing" would thwart the clear congressional purpose underlying the Act by discouraging trial judges from using the services of magistrates to preside over pretrial hearings in a substantial number of cases.

II

The court of appeals correctly rejected respondent's claim that the Act violates Article III of the Constitution. Article III permits but does not require Congress to create lower federal courts. Thus, as was the situation in the early history of this country, Congress could allow the non-Article III state courts to adjudicate all federal questions, including those arising in federal criminal prosecutions. Moreover, this Court has confirmed that Congress, in the appropriate exercise of its constitutional powers, may also create Article I or "legislative" tribunals to conduct federal civil and criminal proceedings. See *Palmore* v. *United States*, 411 U.S. 389 (1973). Hence, there is no unyielding requirement that all facets of the federal judicial power be exercised only by Article III courts.

We believe that, in light of this Court's decisions, Congress could have created an independent Article I magistrate's court to determine suppression claims. For example, in *Palmore* v. *United States*, *supra*, the Court upheld the transfer of entire criminal cases to Article I tribunals, whereas the Act at most delegates certain pretrial proceedings to magistrates. Here, as in *Palmore*, Congress could constitutionally have created a non-Article III tribunal to aid the district courts in their more critical work by relieving the courts of the time consuming responsibility of presiding over pretrial evidentiary hearings.

In any event, 28 U.S.C. 636(b)(1)(B) and (C) do not establish an independent magistrate's court. Rather, Congress carefully limited the magistrate's

functions to those traditionally performed by Article III adjuncts such as masters and commissioners. The district court retains complete control over its cases, because it has plenary power to appoint and remove magistrates and exercises total discretion whether to assign such pretrial matters to a magistrate as seem appropriate. In the event of a delegation of a motion to suppress, the magistrate conducts an evidentiary hearing and tenders proposed findings of fact and recommendations to the district court. The court then determines the issue de novo by reviewing the evidence adduced at the hearing, the magistrate's report, and the submissions of the parties.

The magistrate thus acts as an advisory factfinder within the context of the Article III court. Because the district court retains "the ultimate adjudicatory power over [suppression] motions" (H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 11 (1976)), the fact that the magistrate and not the court presides over the evidentiary hearing does not violate Article III. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 51-52 (1932) ("there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges"). Accordingly, the overwhelming weight of authority supports the conclusion that Article III does not preclude a magistrate from conducting an evidentiary hearing. See, *e.g.*, *Wingo* v. *Wedding*, 418 U.S. 461, 486-487 & n.11 (1974) (Burger, C.J., dissenting) (collecting authorities).

III

The court of appeals erroneously concluded that the pretrial proceedings in this case deprived respondent of due process of law. In the court of appeals' view, the district court was required either to defer to the magistrate's factual finding (a possibility foreclosed by 28 U.S.C. 636(b)(1)(C)) or to rehear the actual testimony adduced at the suppression hearing. At least in the circumstances of this case, where the district court agreed with the magistrate's recommendation, that analysis makes little sense. If the district court had deferred to the magistrate, it obviously would have again accepted the magistrate's findings and would have again denied respondent's suppression motion. That the court undertook a more thorough review of the magistrate's findings and the record as a whole in ruling on the motion cannot have deprived respondent of due process.

Due process, of course, is a flexible concept, dependent on the assessment of a number of important considerations. In *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), this Court specified three factors that should be considered in determining what process is due in a particular circumstance:

> First, the private interest that will be affected by the official action; ~~section~~ Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail.

The procedures set forth in the Act accommodate these competing interests in a constitutionally permissible way.

First, the court of appeals erroneously equated the defendant's interest in the outcome of the suppression motion with that in the criminal trial itself. A motion to suppress evidence, however, implicates the defendant's right to be free from unconstitutional governmental conduct, and the societal interest in deterring such misconduct, and not the defendant's more fundamental life, liberty or property interest in an accurate determination of guilt or innocence. See, *e.g.*, *Lego* v. *Twomey*, 404 U.S. 477, 484-489 (1972); *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976). Accordingly, it is well settled that the process due at a pretrial suppression hearing is considerably less elaborate than the protections accorded the defendant at trial. For example, hearsay is admissible at suppression hearings, although it would not be admissible at trial, and the government's burden of proof at the pretrial hearing is a preponderance of the evidence rather than beyond a reasonable doubt.

Moreover, "[s]ince the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts," *Lego* v. *Twomey*, *supra*, 404 U.S. at 486, reference of a suppression motion to a magistrate poses no risk that a defendant will be erroneously

convicted. Particularly where, as here, the district court adopts the magistrate's findings, determination of a suppression motion in accordance with the Act is substantially reliable. The requirement of a de novo hearing in every case involving conflicting testimony might occasionally change the result of such a motion, but there is no reason to believe that the changed results would be any more accurate. Indeed, most administrative agencies employ factfinding procedures quite similar to those challenged here. An administrative law judge hears the actual testimony and makes the initial findings of fact. Thereafter the agency itself enters the administrative findings based on a de novo review of the record. The validity of such procedures is beyond dispute. See, *e.g.*, *Morgan* v. *United States*, 298 U.S. 468 (1936); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-497 (1951).

Finally, the court of appeals failed to consider the substantial governmental interests underlying the Act or the major fiscal and administrative burdens that a two-hearing requirement would impose. The Act is designed to relieve the overburdened district courts so that judges may allocate their scarce time and resources to conducting trials and rendering legal decisions. Congress recognized that it could create additional judgeships to handle the flood of litigation. It reasonably concluded, however, that the extensive use of magistrates, particularly with regard to pretrial factual matters, would be a more efficient, more flexible, and less expensive solution to the prob-

lem. If affirmed, the court of appeals' decision will frustrate these important goals by forcing district courts either to conduct a second evidentiary hearing in a large number of cases or, as is more likely, to dispense with the use of magistrates altogether.

ARGUMENT

At issue in this case is the constitutionality of the Federal Magistrates Act ("the Act"), 28 U.S.C. 636 (b). The court of appeals correctly concluded that the Act authorizes a district court to refer a suppression motion to a magistrate for an evidentiary hearing and thereafter to decide the motion based solely on its review of the testimony adduced before the magistrate, the magistrate's report and recommendations, and the submissions of the parties. See 28 U.S.C. 636(b)(1)(B) and (C); point I, *infra*. Although respondent apparently acknowledges that the pretrial proceedings that occurred here comport with the Act, he nonetheless contends that the Act, at least as applied in this case, violates the Constitution. In our view, however, referral of a suppression motion to a magistrate does not vitiate the guarantees of Article III, particularly where, as here, the district court makes an independent ("de novo") determination of the suppression issue. See point II, *infra*. Furthermore, we submit that the Due Process Clause does not require that the district court actually rehear the live testimony previously adduced before the magistrate. See point III, *infra*.

I. THE FEDERAL MAGISTRATES ACT PERMITS A DISTRICT COURT TO MAKE A "DE NOVO DETERMINATION" OF A SUPPRESSION MOTION BASED ON THE PROCEEDINGS BEFORE A MAGISTRATE AND WITHOUT REHEARING THE TESTIMONY OF THE WITNESSES

As the court of appeals concluded, the pretrial proceedings in this case did not violate the Act. Indeed, we do not understand respondent to contend otherwise. Nonetheless, it is useful to begin with a discussion of the Act itself, both because the Court need only consider the constitutional issues presented if the proceedings below complied with the statute and because a brief summary of the background and structure of the Act will aid in the constitutional analysis. As we show below, the language, legislative history, and purpose of 28 U.S.C. 636(b)(1)(C) demonstrate conclusively that a district court may make a "de novo determination" of a suppression motion without hearing anew the testimony previously adduced before the magistrate.

A. Introduction

The Federal Magistrates Act, which was enacted in 1968, "created a system of full-time and part-time judicial officers who would perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload." S. Rep. No. 94-625, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 4 (1976); see *Mathews* v. *Weber*, 423 U.S. 261, 267-270 (1976). The origi-

nal version of the Act empowered magistrates to do the work previously carried out by federal commissioners, to try certain petty misdemeanors, and to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. (1970 ed.) 636(a) and (b). Although the open-ended language of the original Act was designed to encourage district court experimentation (see S. Rep. No. 371, 90th Cong., 1st Sess. 26 (1967)), the phrase "such additional duties * * *" in fact resulted in substantial appellate litigation, much of it adverse to Congress' apparent intent. See, *e.g.*, *Wingo* v. *Wedding*, 418 U.S. 461 (1974); *id.* at 487 (Burger, C.J., dissenting) (urging Congress to clarify the Act): H.R. Rep. No. 1609, *supra*, at 5-6.

Accordingly, in 1976, Congress amended the Act "in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." S. Rep. No. 94-625, *supra*, at 1; H.R. Rep. No. 94-1609, *supra*, at 2.[11] In particular, the 1976 amendment firmly established that magistrates could conduct hearings with regard to any pretrial motion in either civil or criminal cases. See Pub. L. No. 94-577, 90 Stat. 2729 (codified at 28 U.S.C. 636 (b)(1)(A) and (B)); see, *e.g.*, *Orand* v. *United*

[11] The Act was further amended on October 10, 1979, to permit a magistrate, upon consent of the parties, to conduct any civil or criminal (misdemeanor) trial. See Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643. This amendment does not change Section 636(b) or affect the issues posed by this case.

States, 602 F.2d 207 (9th Cir. 1979). Thus, with regard to most preliminary motions, Section 636(b)(1)(A) states that a district court may "designate a magistrate to hear and determine" the motion and that the magistrate's decision is final, subject to review by the district court on a "clearly erroneous or contrary to law" standard. See H.R. Rep. No. 94-1609, *supra*, at 9-10.

Certain "dispositive motions,"[12] including "a motion * * * to suppress evidence in a criminal case," are, however, excepted from the scope of Section 636(b)(1)(A). As to these motions, Section 636(b)(1)(B) provides that a district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to [the] judge * * * proposed findings of fact and recommendations for the disposition, by [the] judge * * *, of [the] motion." After holding the suppression hearing, the magistrate files his proposed findings and recommendations with the court and serves a copy of his report on the parties. 28 U.S.C. 636(b)(1)(C). Within 10 days of receiving the report, any party may "file written objections to such proposed findings and recommendations." *Ibid.* Thereafter the district court is free to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magis-

[12] See S. Rep. No. 94-625, *supra*, at 9; H.R. Rep. No. 94-1609, *supra*, at 10. Other so-called "dispositive motions" include motions to quash an indictment, habeas corpus petitions, and motions for summary judgment and injunctive relief See 28 U.S.C. 636(b)(1)(A).

trate," based on its "de novo determination" of the suppression motion. In addition, Section 636(b)(1)(C) states that the court "may also receive further evidence or recommit the matter to the magistrate with instructions."

B. A "De Novo Determination" Of A Suppression Motion Does Not Entail A Second Evidentiary Hearing

1. Nothing in the language of Section 636(b)(1)(C) suggests that Congress intended to require a district court to hear anew the testimony already heard and evaluated by the magistrate. To the contrary, it is apparent that Congress sought to relieve the district court of the burden of conducting an evidentiary hearing with regard to every pretrial motion. Thus, the Act mandates only that the district court make a de novo *determination* of a suppression motion based on various written submissions and not that the court hold a de novo *hearing*. See, *e.g.*, *United States* v. *Leiberman*, No. 78-1465 (1st Cir. Nov. 7, 1979), slip. op. 20-21; *Muhich* v. *Allen*, 603 F.2d 1247, 1252 (7th Cir. 1979); *Orand* v. *United States*, *supra*, 602 F.2d at 208-209; *United States* v. *Whitmore*, 595 F.2d 1303, 1305-1306 & n.1 (5th Cir. 1979), petition for cert. pending, No. 79-375. Where Congress thought it appropriate for the district court to "hear the evidence" previously heard by the magistrate, such as in the case of contempt committed before the magistrate, Congress so specified. See 28 U.S.C. 636(d).[13]

[13] The Federal Magistrates Act of 1979 redesignates Section 636(d) as Section 636(e). See note 11, *supra*.

Moreover, the last sentence of Section 636(b)(1)(C), which provides that the district judge "may also receive further evidence," strongly indicates that a "de novo determination" is something other than a de novo hearing. If Congress had intended that the district court's de novo determination of a suppression motion involve a second evidentiary hearing, there would have been no need to specify that the court has the discretionary power to hear actual testimony if it wishes to do so. The conclusion that the "de novo determination" requirement imposes a duty on the district court to rehear live testimony thus renders the last sentence of Section 636(b)(1)(C) mere surplusage and consequently "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). See, *e.g.*, *Reiter* v. *Sonotone*, No. 78-690 (June 11, 1979), slip op. 5; *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Furthermore, construing Section 636(b)(1)(C) to require the district court to hold a redundant evidentiary hearing "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 489 (1947); see *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, *supra*, 412 U.S. at 631. The Act evidences a clear congressional purpose to alleviate the increasing congestion of litigation in the district courts. See, *e.g.*, *Mathews* v. *Weber*, *supra*, 423 U.S. at 266-269; *Wingo* v. *Wed-*

ding, 418 U.S. 461, 463 (1974); S. Rep. No. 371, 90th Cong., 1st Sess. 8-12 (1967); H.R. Rep. No. 94-1609, *supra*, at 4-8; S. Rep. No. 94-625, *supra*, at 2-6; H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 2-5, 19-20 (1979); S. Rep. No. 96-74, 96th Cong., 1st Sess. 1-3 (1979).[14] That purpose would be substantially undermined if the statute were held to mandate a duplicative hearing before the district court whenever a party objected to a magistrate's proposed finding or even whenever the magistrate's recommendation was based on his evaluation of conflicting testimony.

In other words, if the statute were read to mandate a rehearing where, as here, there is a conflict in testimony, then two hearings would be required with regard to many, if not most, dispositive pretrial mo-

[14] See generally *Federal Magistrates Act: Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 15-17, 25-37, 45-47, 52-54, 91-98, 210-222, 236 (1966-1967); *Federal Magistrates Act: Hearings on S. 945, etc., Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 65-81, 96-104, 117-120, 127-131, 150-158 (1968); *Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 1-20, 33-40 (1975); *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 1-6, 14-28, 47-55, 90-95 151-158, 180-182 (1977); *Hearings on Magistrates Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 55-57, 86-99, 123-127, 152-160, 182-185, 188-191, 409-485 (1977).

tions. An evidentiary hearing obviously is unnecessary if the facts are uncontested; in such cases the court can decide the legal issues without resort to a magistrate. It is only where the evidence is in dispute that the magistrate has a useful role to play. Hence, a two hearing requirement would undoubtedly terminate the heretofore common practice of assigning pretrial hearings to magistrates. See *1979 Annual Report of the Director of the Administrative Office of the United States Courts* A-144 to A-145 (Table M-4) (in FY 1979, magistrates handled a total of 18,027 Section 636(b)(1)(B) motions).[15] Rather than waste the resources of the court, including courtroom space and court reporters, and the time of the magistrate, counsel and witnesses in a dress rehearsal, the district court would conduct the pretrial hearing itself in the first instance, at least where there was a fair possibility that a conflict in testimony would arise. As a result, the congressional purpose to encourage the use of magistrates to conduct pretrial hearings "as a means of freeing time of district court judges to preside at trials" would be frus-

[15] Most suppression motions involve credibility determinations. See, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737, 741 (1966). Therefore, even if the language of the statute could somehow be construed to necessitate two hearings only in suppression cases involving conflicting testimony, the impact would be substantial. In FY 1979, magistrates made recommendations on 1,604 criminal motions pursuant to Section 636(b)(1)(B)—an increase of more than 21% over the previous year. Compare *1979 Annual Report, supra*, at A-144 with *1978 Annual Report of the Director of the Administrative Office of the United States Courts* A-144 (Table M-4).

trated. See H.R. Rep. No. 94-1609, at 4, 7. See also S. Rep. No. 94-625, *supra*, at 3-5; *Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 1, 4, 36 (1975).

2. In any event, the legislative history forecloses any argument on this point. The original Senate version of the 1976 amendment did not contain the "de novo determination" language. See S. 1283, 94th Cong., 2d Sess. (1975), reprinted in S. Rep. No. 94-625, *supra*, at 2. In order to clarify "the type of review afforded a party who takes exceptions to a magistrate's findings and recommendations in [accordance with Section 636(b)(1)(C)]," the House added the "de novo determination" imperative. See H. R. Rep. No. 94-1609, *supra*, at 3. The House Report accompanying the 1976 amendment unambiguously states (*ibid.*):

> The use of the words "de novo determination" is not intended to require the judge to actually conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate.

See also *id.* at 11; 122 Cong. Rec. 35182-35183 (1976) (remarks of Rep. Railsback); *Hearings on S. 1283*, *supra*, at 4.

H.R. Rep. No. 94-1609 further explains that "[t]he approach of the Committee, as well as that of the

Senate, is adopted from the decision of the United States Court of Appeals for the Ninth Circuit in *Campbell* v. *United States District Court for the Northern District of California*, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974)." H.R. Rep. No. 94-1609, *supra*, at 3. In *Campbell*, the court of appeals held that a district court could refer a suppression motion to a magistrate and then make a "de novo determination" of the motion based on the record adduced before the magistrate and the magistrate's recommendations. See 501 F.2d at 206.[16] The court specifically noted that the district court "may, in the exercise of its discretion, call and hear the testimony of a witness or witnesses in an adversary proceeding [, but i]t is *not required to hear any witness and not required to hold a de novo hearing of the case.*" *Id.* at 206-207 (emphasis supplied), quoted with approval in H.R. Rep. No. 94-1609, *supra*, at 3-4. See also *id.* at 6; *Hearings on S. 1283*, *supra*, at 23.

Finally, Congress has recently confirmed that the Act does not impose a double hearing requirement in the event of a reference of a suppression motion to a magistrate. The legislative history of the 1979 amendment to the Act (see note 11, *supra*) reemphasizes that a "de novo determination" is not a "de novo hearing." For example, the pertinent Senate Report

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[16] *Campbell*, of course, was decided under the original version of the Act, which provided that magistrates could take on "such additional duties as are not inconsistent with the Constitution and laws of the United States." See 501 F.2d at 201; page 20, *supra*.

states that, consistent with congressional intent, the Act has "facilitated a rational division of labor among judicial officers in the district court, as *the magistrate would relieve the judge from personally hearing each and every pretrial motion* or proceeding in the preparation of a case for trial." S. Rep. No. 96-74, 96th Cong., 1st Sess. 4 (1979) (emphasis supplied). Similarly, both the Senate and House Hearings on the 1979 amendment reflect Congress' clear understanding that "the words 'de novo determination' in subparagraph 636(b)(1)(C) do *not* require the judge to actually conduct a new hearing on contested issues." *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 37 (1977) (emphasis in original). See also *Hearings on Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 167, 257 (1977). Such subsequent legislative history is entitled to significant weight where, as here, Congress has unequivocally stated its views in the course of amending the statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

II. REFERENCE OF A SUPPRESSION MOTION TO A MAGISTRATE FOR AN EVIDENTIARY HEARING IN ACCORDANCE WITH 28 U.S.C. 636(b)(1)(B) AND (C) DOES NOT VIOLATE ARTICLE III OF THE CONSTITUTION

In the courts below, respondent contended that Article III of the Constitution barred reference of his

suppression motion to a magistrate. The court of appeals rejected this claim, observing that Congress had "avoid[ed] any such objections by requiring that a district court judge 'shall make a de novo determination' on contested aspects of a magistrate's recommendation in case dispositive motions" (Pet. App. 14a). As we now demonstrate, the court of appeals' conclusion is manifestly correct.

A. A Motion To Suppress Evidence In A Federal Criminal Prosecution Need Not Be Heard In A Court Created Under Article III

1. Article III of the Constitution establishes the framework for the judicial branch of the federal government. Section 1 of Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Judges of Article III courts hold office during their good behavior and their salaries may not be reduced during their tenure. Article III further states that the "judicial Power shall extend" to various classes of cases, including those "arising under * * * the laws of the United States" (Section 2). Although it therefore follows that an Article III judge may conduct a suppression hearing as part of a federal criminal prosecution, nothing in the text or history of Article III or in this Court's decisions suggests that *only* an Article III judge is constitutionally permitted to conduct such a hearing.[17]

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[17] At the outset, we submit that Congress' considered judgment that the Act satisfies Article III is entitled to deference. To be sure, "[i]t is, emphatically, the province and duty of

Section 1 of Article III permits rather than directs Congress to create lower federal courts. See *Palmore* v. *United States*, 411 U.S. 389, 400-402 (1973); *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). That discretionary power was the result of a compromise at the Constitutional Convention of 1787 between those who favored a strong national government with an independent judiciary and those who thought that the state courts should adjudicate questions of federal law subject to appellate review in a supreme court. See M. Farrand, *The Records of the Federal Convention of 1787*, Vol. 1, at 124-127, and Vol. 2, at

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the judicial department, to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But it is also true that an act of Congress is presumptively constitutional and that that presumption is particularly strong where Congress has analyzed the constitutionality of a proposed statute in considerable detail. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 703 (1974); *Palmore* v. *United States*, 411 U.S. 389, 409 (1973); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964). See also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541-543 (1962). Here, after consulting various authorities and debating the matter at length, Congress has repeatedly asserted its firm view on the validity of the Act. See, *e.g.*, S. Rep. No. 371, *supra*, at 12, 25; S. Rep. No. 94-625, *supra*, at 6; H.R. Rep. No. 94-1609, at 8; S. Rep. No. 96-74, *supra*, at 6; H.R. Rep. No. 96-287, *supra*, at 7-9, 20, 31-33; *Federal Magistrates Act: Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 111-195, 246-258 (1966-1967); *Hearings on S. 1283*, *supra*, at 6; *Hearings on the Magistrate Act of 1977*, *supra*, at 29, 158-159, 185, 191; *Hearings on Magistrates Reform*, *supra*, at 99-109, 189, 419-427. See also *Mathews* v. *Weber*, *supra*, 423 U.S. at 269-270.

45-46 (1966); *The Federalist* Nos. 80-82 (A. Hamilton); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 52-57 (1923). Indeed, as the Framers had anticipated, "[d]uring most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwickler* v. *Koota*, 389 U.S. 241, 245 (1967); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 551 (1962) (plurality opinion); *Palmore* v. *United States*, *supra*, 411 U.S. at 401-402; *Swain* v. *Pressley*, 430 U.S. 372, 383 n.17 (1977).

Thus, it is settled that Congress may refuse to create Article III courts, it may establish such courts but with limited jurisdiction,[18] and it may withdraw such jurisdiction once conferred. See, *e.g.*, *Carey* v. *Curtis*, *supra*, 44 U.S. (3 How.) at 245; *Sheldon* v. *Sill*, 49 U.S. (8 How.) 440 (1850); *Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 551-552. Moreover, Congress' power in this regard is not limited either to establishing Article III courts to adjudicate federal questions or to delegating that task to existing state courts. Rather, Congress may create so-called "legis-

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[18] It was not until 1875 that Congress authorized the lower federal courts to exercise general "federal question" jurisdiction, and even then the state courts retained concurrent jurisdiction over many "federal" cases and exclusive jurisdiction over cases not satisfying the jurisdictional amount requirement. See Act of March 3, 1875, ch. 137, Section 1, 18 Stat. 470; *District of Columbia* v. *Carter*, 409 U.S. 418, 427-428 n.20 (1973).

lative" or Article I courts to decide inherently judicial matters arising under the Constitution and laws of the United States without violating Article III. See, *e.g.*, *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828) (territorial courts); *In re Ross*, 140 U.S. 453, 464-465, 480 (1891) (consular courts); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (customs courts); *Crowell* v. *Benson*, 285 U.S. 22, 48-65 (1932) (administrative proceedings); *Williams* v. *United States*, 289 U.S. 553 (1933) (court of claims); *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943) (bankruptcy proceedings before the Interstate Commerce Commission).[19]

[19] The court stated in *Crowell* that Article III courts must be allowed to determine so-called jurisdictional facts, that is, facts relating to Congress' constitutional power to act in a particular area. 285 U.S. at 54-61. (In *Crowell* those facts involved whether the claimant under the Longshoremen's and Harbor Workers' Compensation Act was an employee working on the navigable waters at the time of the accident). Both the subsequent opinions of this Court and the commentators strongly suggest that this aspect of *Crowell* retains little or no vitality. See, *e.g.*, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49-52 (1938); *Estep* v. *United States*, 327 U.S. 114, 142 (1946) (Frankfurter, J., dissenting); P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, *Hart and Wechsler's The Federal Courts and The Federal System* 339-340 (2d ed. 1973). W. Gellhorn & C. Byse, *Administrative Law* 419-427 (6th ed. 1974); 4 K. Davis, *Administrative Law Treatise* § 29.08 (1958). In any event, a motion to suppress does not involve the determination of jurisdictional facts, and the magistrate's role is limited to making a recommendation. See point IIB, *infra*.

The rule that federal questions need not be litigated in Article III courts applies with full force to the enforcement of the federal criminal law. Article III does not differentiate in this regard between federal criminal and civil proceedings.[20] Moreover, "[v]ery early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges in Art. III." *Palmore* v. *United States*, *supra*, 411 U.S. at 402. See Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 551-553, 570-572 (1925); Act of March 2, 1799, ch. 43, Sections 14, 15, 20 and 28, 1 Stat. 733, 736-740. In fact, the Court has unanimously concluded that Congress may constitutionally require state courts to enforce federal penal statutes. *Testa* v. *Katt*, 330 U.S. 386 (1947). Simply stated, "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts." *Swain* v. *Pressley*, *supra*, 430 U.S. at 382-383; see *Palmore* v. *United States*, *supra*, 411 U.S. at 407. As is true in the civil context, Congress may delegate administration of criminal justice to Article I tribunals as well as to state courts. See, *e.g.*, *Palmore* v. *United States*, *supra*; *Swain* v. *Pressley*, *supra*; *In re Ross*, *supra*.

2. The question of what limits, if any, Article III places on the congressional power to create Article I

[20] By contrast, Article III, Sec. 2, cl. 3 guarantees the right to a jury trial in the state of the offense in all criminal cases except impeachment.

or legislative courts has not been fully explored by this Court. Although we are aware of no decision of the Court holding that an act of Congress establishing a non-Article III tribunal to adjudicate legal claims violates Article III, we assume, *arguendo*, that Article III bars Congress from essentially replacing an independent judiciary with Article I courts.[21] Cf. *O'Donoghue* v. *United States*, 289 U.S. 516, 530-531 (1933). Nonetheless, there is no doubt that at a minimum "the requirements of Art. III * * * must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States*, *supra*, 411 U.S. at 407-408. Accordingly, we submit that even if the Act is viewed as creating an Article I magistrate's court (but see point IIB, *infra*), Section 636(b)(1)(B) falls well within the limits of Congress' power.

For example, in *Palmore* v. *United States*, *supra*, the Court upheld Congress' decision to give exclusive jurisdiction over criminal prosecutions arising under the District of Columbia (federal) laws to Article I courts. The Court concluded that this exercise of

[21] Certainly the language of Article III does not appear to constitute such a limitation. Moreover, it has been suggested that Article III is satisfied so long as an appeal to an Article III tribunal is available regarding federal questions. See *Swain* v. *Pressley*, *supra*, 430 U.S. at 382 n.16; Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U.L. Rev. 1297, 1316-1317 (1975).

congressional power over the District of Columbia[22] did not run afoul of Article III because of the perceived need "to relieve the regular Art. III courts * * * from the smothering responsibility for [a] great mass of litigation * * *." 411 U.S. at 408-409. In light of the nature of the caseload assigned to the Article I tribunals, Congress could constitutionally address the court congestion problem without creating additional Article III judgeships. See *id.* at 409-410.

So too here, Congress constitutionally authorized district courts to delegate various pretrial matters to magistrates as a means of alleviating the enormous crush of litigation in the district courts. See, *e.g.*, H.R. Rep. No. 94-1609, *supra*, at 4-7, 13; S. Rep. No. 94-625, *supra*, at 2-5; pages 23-25, *supra*. Congress has plenary power to enact, and to dictate the means of enforcing, federal criminal laws and "[t]o constitute Tribunals inferior to the Supreme Court." Art. I, sec. 8, cl. 9; *De Costa* v. *Columbia Broadcasting System, Inc.*, 520 F.2d 499, 503 n.3 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976). Given the limited nature of the delegation under 636(b)(1)(B) and the greater flexibility and lesser cost of magistrates as compared to judges, here (as in *Palmore*) Congress was entitled to employ Article I tribunals to aid the district courts in the administration of justice. In short, Section 636(b)(1)(B) does not represent an attempt by Congress to eliminate

[22] See Art. I, Sec. 8, cl. 17.

an independent judiciary, in violation of Article III. To the contrary, Congress has attempted merely to assist Article III judges in carrying out the critical judicial functions of conducting trials and rendering legal decisions.

Finally, the Court's cases regarding the military draft further demonstrate the constitutionality of Sections 636(b)(1)(B) and (C). In the *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918), the Court summarily rejected the contention that a conviction for failing to submit to induction was invalid under Article III because the local draft boards and not the Article III court made the factual determinations regarding the defendant's eligibility for the draft. Hence, nothing in Article III precludes a federal prosecution brought in an Article III court based in part on factual findings determined by an Article I tribunal. See *Estep* v. *United States*, 327 U.S. 114 (1946); *McGee* v. *United States*, 402 U.S. 479, 483 (1971).[23] *A fortiori*, where, as here, the "Article I"

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[23] In *Estep*, the Court concluded that although even erroneous findings of the local board were ordinarily binding in the subsequent prosecution, a defendant was entitled to show that there was no basis in fact for the draft board's classification (327 U.S. at 122-123):

> It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

tribunal is limited to making *proposed* findings about the admissibility of evidence in a pending criminal prosecution, and those findings and recommendations are subject to a de novo determination by the Article III court, the defendant's Article III rights are fully protected.

B. The District Court's De Novo Determination Of The Suppression Motion In Accordance With Section 636(b)(1)(C) Satisfies The Requirements of Article III

We have demonstrated above that there is no Article III impediment to the creation of an Article I magistrate's court to decide suppression motions. We submit, however, that in amending the Act in 1976 Congress was far more solicitous of Article III considerations, including the integrity and independence of the judiciary. In the first instance, magistrates are appointed by and subject to removal by a majority of the (Article III) judges in the district court or courts in which the magistrate sits. See 28 U.S.C. 631(a), (h). Moreover, the district court has initial and unfettered discretion to decide whether to designate a magistrate to hold an evidentiary hearing concerning a suppression claim. Thereafter, the magistrate conducts the hearing under the aegis of the Article III court, and his proposed findings and recommendations are subject to a de novo determination "by the judge who * * * then exercise[s] the ultimate authority to issue an appropriate order." S. Rep. No. 94-625, *supra*, at 3. See, *e.g.*, *id.* at 2, 5-6,

9-10; H.R. Rep. No. 94-1609, *supra*, 3-5, 7-8, 10-11; S. Rep. No. 371, *supra*, at 12. Finally, the district court retains the power to rehear all or part of the live testimony.

Thus, the magistrate does not function independently of the district court. Rather, a magistrate is an adjunct to the Article III decision-maker, essentially performing the same tasks that a master or admiralty commissioner might perform.[24] The constitutionality of using such non-Article III entities to conduct evidentiary hearings or otherwise to aid in the determination of facts is not subject to question. As the Court pointed out in *Crowell* v. *Benson*, *supra*, 285 U.S. at 51-52 (emphasis supplied; footnotes omitted):

> [T]here is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions * * *. *While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found.*

[24] The magistrate has venerable antecedents in both American and English practice. See generally Silberman, *Masters and Magistrates Part I: The English Model*, 50 N.Y.U.L. Rev. 1070 (1975); Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U.L. Rev. 1297 (1975); *Hearing on S. 1283*, *supra*, at 6; *Mathews* v. *Weber*, *supra*, 423 U.S. at 268-269, n.4. Indeed, this Court, which is also subject to the constraints of Article III, routinely refers cases arising under its original jurisdiction to special masters for extensive fact-finding purposes.

Similarly, there can be no serious question that Congress may constitutionally direct—or, as here, permit—the district courts to refer a suppression motion to a magistrate for an evidentiary hearing. Article III does not limit Congress' power to alter the mode of proceeding in the district court, as opposed to removing the proceeding from the district court altogether. See, *e.g.*, *Holiday* v. *Johnston*, 313 U.S. 342, 352 (1941) (Congress has power to permit reference of a habeas corpus petition to non-Article III commissioner for an evidentiary hearing); *Crowell* v. *Benson*, *supra*, 285 U.S. at 52-54; *Ex parte Peterson*, 253 U.S. 300, 312-313 (1920); Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 787-789, 794, 803 (1975); Silberman, *Masters and Magistrates Part II*, *supra*, 50 N.Y.U. L. Rev. at 1310-1314.[25] In sum, as the court of ap-

[25] With regard to some civil and criminal trials, Congress' power to delegate the factfinding function is, of course, limited by the Sixth and Seventh Amendments.

peals concluded (Pet. App. 14a), because under Section 636(b)(1)(C) an Article III court retains "the ultimate adjudicatory power over [suppression] motions" (H.R. Rep. No. 94-1609, *supra*, at 11; S. Rep. No. 94-625, *supra*, at 10), the Act satisfies Article III concerns.

It is therefore not surprising that the overwhelming weight of authority supports the conclusion that the procedures sanctioned by the Act do not violate Article III. At least two Members of this Court and four courts of appeals have agreed that Article III does not bar a magistrate from conducting an evidentiary hearing, at least so long as the district court retains the power to make the final decision. *Wingo* v. *Wedding*, *supra*, 418 U.S. at 486-487 & n.11 (Burger, C.J., joined by White, J., dissenting); *Hill* v. *Jenkins*, 603 F.2d 1256, 1258 (7th Cir. 1979); *Muhich* v. *Allen*, *supra*, 603 F.2d at 1250-1251; *Sick* v. *City of Buffalo*, 574 F.2d 689, 693 & n.17 (2d Cir. 1978); *Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1133 (2d Cir. 1977); *Cruz* v. *Hauck*, 515 F.2d 322, 328-330 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976); *Campbell* v. *United States District Court*, *supra*, 501 F.2d at 200-201.[26] The great ma-

[26] See also *Mathews* v. *Weber*, *supra*, 423 U.S. at 269-270; *Bowman* v. *Bordenkircher*, 522 F.2d 209, 210 (4th Cir. 1975); *United States ex rel. Henderson* v. *Brierley*, 468 F.2d 1193, 1194-1195 (3d Cir. 1972). The First and Sixth Circuits have stated that a magistrate's final determination of a claim raises serious Article III questions in the absence of the parties' consent. Compare *United States* v. *Edwards*, 602 F.2d 458, 467 n.8 (1st Cir. 1979), with *De Costa* v. *Columbia*

jority of commentators have also supported this view. See, *e.g.*, Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 365 (1973); Note, *Masters and Magistrates in the Federal Courts*, *supra*, 88 Harv. L. Rev. at 787-789; Silberman, *supra*, 50 N.Y.U. L. Rev. at 1310-1317; Comment, *An Expanding Civil Role For United States Magistrates*, *supra*, 26 Am. U. L. Rev. 66, 74-82 (1976); Note, *Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates*, 54 Iowa L. Rev. 1147, 1159-1162 (1969). In these circumstances, deference to Congress' considered judgment on this question is appropriate. See S. Rep. No. 94-625, *supra*, at 6; H.R. Rep. No. 94-1609, *supra*, at 8; note 17, *supra*.

Broadcasting System, Inc., 520 F.2d 499 (1st Cir. 1975). See *Ellis* v. *Buchkoe*, 491 F.2d 716, 717 (6th Cir. 1974). In this case, of course, the magistrate merely submitted a recommendation to the district court, which made the final determination of the suppression motion.

The Eighth Circuit has indicated that a magistrate may constitutionally conduct a hearing but that if a party objects to the magistrate's findings, the district court may be required under Article III to rehear the testimony. See *Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973). For the reasons stated above, we believe that this suggestion, which was not preceded by any analysis and was not necessary to the disposition of the case, is incorrect.

III. DETERMINATION OF A SUPPRESSION MOTION IN ACCORDANCE WITH 28 U.S.C. 636(b)(1)(B) DOES NOT DEPRIVE A DEFENDANT OF DUE PROCESS OF LAW

A. Introduction

The principal issue in this case is whether the procedures set forth by Congress in the Federal Magistrates Act deprive a defendant of due process insofar as they allow a district court to deny a motion to suppress evidence based on the proceedings before the magistrate, the magistrate's report, and the submissions of the parties—but without an evidentiary hearing conducted by the court itself. To be sure, a defendant is entitled to an evidentiary hearing regarding the admissibility of his inculpatory statements. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368 (1964). But respondent received a full and fair hearing before the magistrate, and he does not contend otherwise.[27] In light of the evidence offered at the hearing, the magistrate reasonably found that the testimony of the Chicago police officer and the federal agents was more credible than that of respondent, and he therefore recommended that the motion to suppress be denied.[28] Thereafter, the district court made

[27] Respondent does not assert that the hearing was in any way inadequate, except that it was presided over by the magistrate and not an Article III judge. See point II, *supra*.

[28] Respondent, who has a substantial criminal record (see page 9, *supra*), repeatedly claimed that he made no statements at all when he was arrested on August 8, 1976, despite his counsel's best efforts to make him recall such statements (Tr. 123-125, 127-130, 149-153). Officer Vollick of the Chicago Police Department and the contemporaneous police report of the arrest both unequivocally stated that respondent, after being advised of his rights, admitted bringing the gun with him when he went to "discuss" a family matter with Batson (Tr. 4-5, 14-15, 21, 31-32, 149-153). Those statements coincide with respondent's statement of January 12, 1977, which respondent does not deny making and which, of course, could not have been known to the Chicago police at the time the report was prepared in August 1976. Moreover, respondent admitted lying to the police in November 1976. Finally, his claim that he had been promised immunity by the ATF agents was flatly denied by those agents. See pages 6-9, *supra*.

a de novo review of the suppression claim, agreed with the magistrate's proposed findings and recommendations, and denied respondent's motion. In our view, these extensive proceedings met the requirements of due process.

Neither common sense nor precedent supports the court of appeals' contrary conclusion. The court below held that the Due Process Clause requires the district court either to rehear the testimony previously adduced before the magistrate or to defer to the magistrate's evaluation of that testimony. However, as the court conceded (Pet. App. 18a), the statute itself precludes the latter alternative; the district court must make a de novo determination of the suppression issue. But even more important, at least where, as here, the district court decides to adopt the magistrate's proposed findings and recommendations, the Act's requirement that the district court determine the suppression claim de novo accords a defendant *greater* procedural safeguards than that

provided by a standard of deferential review: if the district court had deferred to the magistrate, rather than determined the matter de novo, the court obviously would have again accepted the magistrate's report and would have again denied respondent's motion. That the court's more thorough review of the record gave respondent a second substantial opportunity to establish his suppression claim surely cannot violate due process. See, *e.g.*, *Wingo* v. *Wedding*, *supra*, 418 U.S. at 486-487 (Burger, C.J., dissenting); *Mildner* v. *Gulotta*, 405 F. Supp. 182, 195 (E.D. N.Y. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976); *United States* v. *Whitmire*, *supra*, 595 F.2d at 1305-1306 & n.1; *Loral Corp.* v. *McDonnell Douglas Corp.*, *supra*, 558 F.2d at 1133.

The inexorable logic of this position is also supported by the cases interpreting the Due Process Clause. Due process is, of course, a flexible concept, varying in accordance with "the precise nature of the government function involved as well as of the private interest that has been affected." *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). See, *e.g.*, *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, No. 78-201 (May 29, 1979), slip op. 10; *Wolff* v. *McDonnell*, 418 U.S. 539, 560 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The Court has identified three factors that must be weighed in order to determine what process is due in a particular circumstance (*Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Accord, *Mackey* v. *Montrym*, No. 77-69 (June 25, 1979), slip op. 8; *Parham* v. *J.L.*, No. 75-1690 (June 20, 1979), slip op. 13-14; *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 10. We submit that the Act appropriately balances these factors.

B. The court of appeals erroneously equated respondent's interest in the outcome of the suppression hearing with his interest in the criminal trial itself

The court of appeals' analysis is premised on the erroneous notion that a suppression motion is "in effect the prosecution" (Pet. App. 17a) and that therefore the process due respondent at that proceeding is equivalent to the procedural protections that must be accorded at the criminal trial itself. See also Pet. App. 16a, 21a-24a. This Court has repeatedly emphasized, however, that the suppression remedy is ordinarily concerned with the deterrence of official misconduct or other societal interests and not with the more fundamental determination of guilt or innocence. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 453-454 (1976); *United States* v. *Peltier*, 422

U.S. 531, 535-536, 538-539 (1975); *Lego* v. *Twomey*, 404 U.S. 477, 484-489 (1972); *Rogers* v. *Richmond*, 365 U.S. 534, 540-544 (1961). In the Fourth Amendment area, for example, the Court has remarked that the exclusion of relevant evidence, while important as a means of compelling "respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it" (*Elkins* v. *United States*, 364 U.S. 206, 217 (1960)), nonetheless "deflects the truthfinding process and often frees the guilty." *Stone* v. *Powell*, 428 U.S. 465, 490 (1976). Similarly, where, as in this case, the defendant claims that his confession was involuntary, the remedy of suppression is "designed to safeguard the [Fifth Amendment] right[s] of an individual, entirely apart from his guilt or innocence * * *." *Lego* v. *Twomey*, *supra*, 404 U.S. at 485. Hence, the accused's paramount interest in liberty is not directly at risk at a suppression hearing.

Indeed, the defendant's stake in the outcome of a suppression hearing is significantly less than the individual interests implicated by various civil proceedings. Insofar as the government's burden of proof in a particular kind of proceeding is compelled by the Due Process Clause, it "indicate[s] the relative importance attached to the ultimate decision." *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979), slip op. 4. See *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). As the Court held in *Lego* v. *Twomey*, *supra*, 404 U.S. at 489, the prosecution need demonstrate the voluntariness of a challenged

confession only by a preponderance of the evidence. In contrast, the government bears a burden of proof by clear and convincing evidence in a number of civil contexts, including commitment to a mental institution (*Addington* v. *Texas*, *supra*), deportation (*Woodby* v. *INS*, 385 U.S. 276, 285 (1966)), and denaturalization (*Chaunt* v. *United States*, 364 U.S. 350, 353 (1960); *Schneiderman* v. *United States*, 320 U.S. 118 (1943)). Compare also *United States* v. *Matlock*, *supra*, 415 U.S. at 172-175 (hearsay admissible in suppression hearing), with *Bridges* v. *Wixon*, 326 U.S. 135, 153-154 (1945) (hearsay inadmissible in deportation proceeding).

Moreover, the fact that this preliminary motion occurs in the context of a criminal case, a factor that the court of appeals believed significant (Pet. App. 16a), does not change the analysis. There is a substantial "difference in the *quanta* and modes of proof required to establish" guilt in a criminal case on the one hand and a constitutional violation giving rise to the exclusion of relevant evidence on the other. *Brinegar* v. *United States*, 338 U.S. 160, 173 (1949). In addition to the significant contrast in the burdens of proof applicable to the two proceedings, the government may rely on hearsay evidence in a suppression proceeding even though that same evidence would be inadmissible at trial. See *Brinegar* v. *United States*, *supra*, 338 U.S. at 172-174; *United States* v. *Matlock*, *supra*, 415 U.S. at 172-177; Fed. R. Evid. 104(a), 1101(d)(1). And whereas the Due Process Clause requires that the government disclose an in-

formant's identity at the trial itself if his identity "is relevant and helpful to the defense of an accused" (*Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957)), there is no such constitutional compulsion at the suppression hearing. See *McCray* v. *Illinois*, 386 U.S. 300 (1967). In short, the process due at a pretrial hearing, even in a criminal case, is considerably less elaborate than the procedural safeguards constitutionally required to protect a criminal defendant at trial.

C. Determination Of A Suppression Motion In Accordance With Section 636(b)(1)(B) Sufficiently Minimizes The Risk That Unconstitutionally Obtained Evidence Will Be Erroneously Admitted At Trial

As we have demonstrated above, suppression motions in general, and those regarding involuntary confessions in particular, ordinarily do not implicate the guilt or innocence of a defendant. See, *e.g.*, *Lego* v. *Twomey*, *supra*; *Jackson* v. *Denno*, *supra*, 378 U.S. at 376-377; *Rogers* v. *Richmond*, *supra*, 365 U.S. at 540-544. Therefore, "[s]ince the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts," *Lego* v. *Twomey*, *supra*, 404 U.S. at 486, reference of suppression motion to a magistrate poses no "risk of an erroneous deprivation of" a defendant's liberty. See *Mathews* v. *Elridge*, *supra*, 424 U.S. at 335; *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), slip op. 13. Rather, all that is in issue is the proper application of the exclusionary

rule in a particular case. We submit that Sections 636(b)(1)(B) and (C) adequately protect a defendant's interest in this regard.

1. Neither respondent nor the court of appeals suggests that, as a matter of due process, an impartial magistrate could not conduct a suppression hearing, so long as the district court thereafter deferred to the magistrate's findings. The concession is well-warranted. Due process does require "a reliable and clear-cut determination of the voluntariness of the confession." *Jackson* v. *Denno*, *supra*, 378 U.S. at 391. It matters not, however, whether the trial judge, another judge, a jury other than the trial jury, or any other competent tribunal, resolves the question of voluntariness. See *id.* at 391 n.19; *Lego* v. *Twomey*, *supra*, 404 U.S. at 484 n.9. An impartial magistrate is as capable as a judge or a jury of making a reliable determination of the relative credibility of respondent and the three government agents. Therefore, where, as here, the magistrate is impartial and the defendant is given a full opportunity to present evidence and cross-examine the government's witnesses, the hearing itself does not deprive the defendant of due process. See *Jackson* v. *Denno*, *supra*.

Thus, respondent must base his due process claim solely on the fact that the district court made a thorough ("de novo") review of the magistrate's proposed findings rather than simply deferring to them. Whatever validity that argument might have in other contexts (see pages 52-55, *infra*), it certainly has no merit in the circumstances of this case. As we have already pointed out, at least in those cases

in which the district court ultimately adopts the magistrate's proposed findings, the Act ensures that the aggrieved party has two substantial opportunities to present his case prior to review in the court of appeals. Had the district court simply deferred to the magistrate, respondent would have had only one bite at the apple. The district court's de novo determination of respondent's suppression motion therefore enhanced the reliability of the magistrate's initial findings against respondent. As the Fifth Circuit recently explained (*United States* v. *Whitmire*, *supra*, 595 F.2d at 1305):

> [Sections 636(b)(1)(B) and (C)] provide sufficient safeguards both to ensure the integrity of the factfinding process and retention by the judge of final responsibility for ruling on the motion. Indeed, the factfinding process may be improved by the referral practice. In making a final determination, the district court has the benefit of a carefully developed record, a magistrate's thoughtful consideration of the issues, and argument of counsel regarding specifics not agreeable to the parties.

Determination of a suppression motion in accordance with the Act is thus at least as reliable as the deferential review approved by the court of appeals. In addition, there is no reason to believe that even a two-hearing requirement would appreciably improve the accuracy of the suppression decision. No set of procedures—including a second hearing conducted by the district judge—can totally eliminate the risk of erroneous factfinding in the event that there is a

conflict in the testimony. See *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). Moreover, it is not self-evident that the district court's appraisal of the demeanor evidence would be more accurate than the magistrate's previous evaluation of the witnesses' credibility. Indeed, there is a strong possibility that a second hearing would be a less accurate gauge of the truth, since the witnesses will have had an opportunity to rehearse their story and to shape their testimony. In any event, this Court has made clear that a defendant has no constitutional right even to an appeal in a criminal case, much less to two full suppression hearings in the district court. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894).

2. The reliability and, we submit, constitutionality of the Magistrates Act procedures are further evidenced by the widespread use of similar factfinding processes in numerous situations involving quite substantial private interests. In virtually every administrative agency, the ultimate factfinder is a commission, board or administrator that has not personally heard the witnesses testify. Most often, the findings are based on a de novo review of the record developed before an administrative law judge or hearing officer and the submissions of the parties. See, *e.g.*, 5 U.S.C. 557 (general rule under the APA); 29 U.S.C. 160(c) (NLRB); 33 U.S.C. 921(b)(3) (Benefits Review Board); 17 C.F.R. 201.17(g)(2) (SEC); 17 C.F.R. 10.104 (CFTC); 20 C.F.R. 404.939(a), 404.950(c), 416.1457(a), 416.1469 (Social Security Adminis-

tration). Although the administrative factfinder neither hears the live testimony nor defers to the subordinate tribunal that has, there is no doubt as to the validity of such procedures, provided that the factfinder reviews the evidence in some rational fashion. See, *e.g.*, *Morgan* v. *United States*, 298 U.S. 468 (1936); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-497 (1951); *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131-132 (2d Cir.), cert. denied, 389 U.S. 839 (1967); 2 K. Davis, *Administrative Law Treatise* §§ 11.02 & 11.03 (1958). See also *Richardson* v. *Perales*, 402 U.S. 389 (1971).[29]

In fact, it is well settled that the administrative tribunal may reject the initial findings of the hearing

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[29] *Morgan* involved a decision of the Secretary of Agriculture regarding the maximum allowable prices to be charged by livestock marketing agencies. These agencies claimed that the administrative proceedings had deprived them of due process because the Secretary had made his decision without reviewing the administrative record at all. The Court agreed, observing that "[i]f the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-481. As the Court explained, however, "consideration of the evidence" does not mean that the factfinder must hear the actual testimony:

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense.

Id. at 481.

officer without rehearing the testimony even when the initial findings are based on credibility determinations. See *Universal Camera Corp.* v. *NLRB*, *supra*, 340 U.S. at 492-497. In those circumstances, the administrative findings must be given the deference to which they are otherwise entitled; however, in determining whether there is substantial evidence in the record as a whole to support those findings, a reviewing court is permitted to take into acount the fact that "an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn [different] conclusions." *Id.* at 496.

Accordingly, even where the magistrate recommends that a suppression motion be granted, a district court could reliably and constitutionally make a de novo determination to deny the motion without rehearing the evidence. *Mildner* v. *Gulotta*, *supra*, 405 F. Supp. at 195.[30] To be sure, if the sup-

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[30] Relying on *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463 (2d Cir. 1972), the court of appeals suggested (Pet. App. 21a-22a) that this substantial body of administrative law was inapplicable because this was a criminal case. But see *Mildner* v. *Gulotta*, *supra* (disbarment proceeding). However, as we have already emphasized, the process due at a suppression hearing is not equivalent to that required at a criminal trial. See pages 45-48, *supra*. *Mancusi* is also factually distinguishable. There the question was whether an appellate court could convict a defendant of a lesser included offense after it reversed the conviction for the greater offense because the trial court had admitted the defendant's involuntary confession. Since that confession related to both the greater and lesser offenses and since no jury had ever passed upon defendant's guilt of the lesser offense in the absence of the tainted evidence, the court of

pression hearing were solely a swearing contest between a government agent and the defendant, and if one statement were not inherently more credible than the other, a district court could not arbitrarily disregard the magistrate's proposed findings if those findings were based on the demeanor of the witnesses. In such a circumstance, the district court might well be required to adopt the magistrate's proposed findings or to rehear the testimony in order to make its own credibility determination. See *United States* v. *Bergera*, 512 F.2d 391 (9th Cir. 1975).[31] But that situation is a far cry from the realities of this case. Objective factors, such as respondent's prior criminal record, his admitted lies to the police on November

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appeals correctly concluded that the defendant had been denied due process and the right to a jury trial. 457 F.2d at 468-469. Here, in contrast, an impartial magistrate made specific findings regarding respondent's testimony in the suppression hearing and the district court made a de novo determination based on its review of the entire record including the magistrate's report.

[31] We do not agree with the Ninth Circuit that the district court must always rehear the testimony if it rejects the magistrate's proposed findings. If, as here, there are objective factors in the record justifying the court's conclusion, neither due process nor the Act requires that the district court hear the evidence previously evaluated by the magistrate. This issue is not presented in this case, however, and respondent may not complain because invocation of the Act in other circumstances might raise more difficult constitutional questions. See *United States* v. *Raines*, 362 U.S. 17 (1960). Cf. *Califano* v. *Yamasaki*, *supra*, slip op. 13 ("The nature of the due process hearing is shaped by the 'risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.' ").

19, his implausible testimony regarding his arrest on August 8, and the consistent and corroborating statements of three law enforcement officers, all supported the district court's de novo decision to deny the suppression motion regardless of the magistrate's recommendation. See note 28, *supra*. More important, it is worth repeating that here the district court fully adopted the magistrate's proposed findings and recommendation.

D. Substantial Economic And Administrative Considerations Justify Use Of Magistrates To Conduct Pretrial Evidentiary Hearings

The final factor that must be considered in determining what procedures are constitutionally required in a particular circumstance is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335. See, *e.g.*, *Richardson* v. *Perales*, *supra*, 402 U.S. at 406; *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788 (1973). Even in the context of the criminal trial itself, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson* v. *New York*, 432 U.S. 197, 208 (1977). Where, as here, Congress has provided a reasonable and reliable means of handling pretrial litigation not relating to the guilt or innocence of defendants, the court of appeals should have taken the "fiscal and administrative burdens" into account.

First, underlying the enactment and subsequent amendments of the Act is "Congress' recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance." *Mathews* v. *Weber*, *supra*, 423 U.S. at 268; see, *e.g.*, *Wingo* v. *Wedding supra*, 418 U.S. at 463; S. Rep. No. 94-625, *supra*, at 2-5; H.R. Rep. No. 94-1609, *supra*, at 4-7. See also pages 23-24 & note 14, *supra*. In particular, Congress empowered magistrates to hold pretrial evidentiary hearings so that the district courts could spend more time conducting the actual trials, many of which were subject to the mandatory provisions of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* See, *e.g.*, H.R. Rep. No. 94-1609, *supra*, at 4, 7; S. Rep. No. 94-625, *supra*, at 3-5; *Hearings on S. 1283*, *supra*, at 1, 4-7, 17-18, 36. The frequent and growing use of magistrates to conduct pretrial hearings strongly indicates that the Act is effectuating the congressional purpose. See page 25 & note 15, *supra*.

Thus, the conclusion that due process compels a district court to rehear testimony already heard by an impartial magistrate is directly at odds with the substantial public interest in relieving the overburdened courts. As we have previously indicated, the court of appeals' decision will result either in two virtually identical, full-dress evidentiary proceedings or (more likely) in discontinued use of magistrates in a substantial number of cases. See pages 24-26, *supra*. The consequent cost in terms of increased court congestion

is simply too high a price to pay for the minimal benefits, if any, that would be derived from a two-hearing requirement. See *Richardson* v. *Perales*, *supra*, 402 U.S. at 406.

Finally, Congress' decision to enlist the aid of magistrates rather than increase the number of district judges reflects significant fiscal and administrative policies. The cost of creating and annually funding a judgeship is at least twice that of a magistracy. See, *e.g.*, *Hearings on S. 1283*, *supra*, at 4 ("It is our considered judgment that we cannot continue to cope with this problem [of growing caseloads] by increasing the number of district judges and the supporting staffs of law clerks, secretaries, court clerks, court reporters and other employees, with the concomitant need for huge additional physical space") (remarks of Judge Metzner on behalf of the Judicial Conference); Comment, *An Expanding Civil Role for United States Magistrates*, *supra*, 26 Am. U. L. Rev. at 68 n.8. Furthermore, in many instances a magistrate is a more flexible means of addressing the congestion problem. A magistrate may be hired part-time and may be readily assigned to different tasks in different court houses and even different districts as the need arises. See, *e.g.*, H.R. Rep. No. 94-1609, *supra*, at 9, 12-13. Given all of these factors, and in view of the other considerations mentioned above, Congress' decision to permit magistrates to conduct evidentiary hearings on pretrial motions in criminal cases, subject to the district court's de novo determination of the motion, is reasonable and fully consistent with the dictates of due process.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA,
Petitioner,

v.

HERMAN RADDATZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

Of Counsel:

EUGENE R. WEDOFF
DAVID J. BRADFORD
BARRY LEVENSTAM
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

TERENCE F. MACCARTHY
FEDERAL DEFENDER PROGRAM
219 South Dearborn Street
Chicago, Illinois 60604

JOAN B. GOTTSCHALL
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Court-appointed Attorney for Respondent

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA,
Petitioner,

v.

HERMAN RADDATZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether, in making a de novo determination pursuant to 28 U.S.C. §636 (b) (1) (C), of a motion to suppress evidence initially heard by a magistrate, in which the testimony of the witnesses is conflicting and credibility is critical to the disposition of contested issues, a district judge may properly decline to hear evidence and rely solely on the written record of the proceedings before the magistrate.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 28 U.S.C. §636 (b) (1) provides:

> (b) (1) Notwithstanding any provision of law to the contrary –
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment

> or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

On March 31, 1977, in the United States District Court for the Northern District of Illinois, a one count indictment charging a violation of 18 U.S.C. §922 (h), receipt of a firearm by a convicted felon, was returned against respondent, Herman Raddatz. (R. 1.)[1] To prove where and when Raddatz received the firearm, the Government relied on a statement made by Raddatz to agents of the Bureau of Alcohol, Tobacco and Firearms on January 12, 1977. (Pet. App. 36a-37a.)

Raddatz moved to suppress this and two other statements the Government alleged he had made. (R. 10, 22.) On June 9, 1977, the district judge, pursuant to 28 U.S.C. §636 (b) (1) (B), referred the motion to the executive committee of the court for assignment to a magistrate for a hearing on the motion and the preparation of proposed findings and a recommendation as to disposition.[2] Respondent objected to the reference. (R. 25.) The motion was assigned by lot to Magistrate Carl Sussman. (R. June 17, 1977.)

The magistrate held on evidentiary hearing. Raddatz testified that two federal firearms agents, Paul Russell

[1] "R." refers to the district court's index of record. "Pet. App." refers to the Appendix to the Government's Petition for Certiorari. "App." refers to the Government's separate appendix. "Tr." refers to the transcript of the hearing on respondent's motion to suppress evidence before the magistrate.

[2] Unless otherwise indicated, references to the Federal Magistrates Act, 28 U.S.C. §631 *et seq.*, will be cited to the Act as amended in 1976 and in force prior to the 1979 amendments. *See* Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643. The 1976 version of the Act currently appears in the supplement to Title 28, United States Code Annotated. Section 636 (b) (1), which was the source of authority for the reference in this case, was not affected by the 1979 amendments.

and Richard McCulloch, had promised him that they would secure the dismissal of a forthcoming federal indictment against him if he provided them with information concerning his acquisition of a certain firearm. In his statement of January 12 he provided the requested information. The agents denied the promise. The evidence was conflicting and credibility was critical to the determination of the facts. At the conclusion of the hearing, the magistrate ordered the parties to submit proposed findings of fact and conclusions of law. (Tr. 256.) On November 1, 1977, he transmitted his report to the district court, recommending that the motion be denied and that the distrct court adopt the Government's proposed findings of fact as the court's findings. (R. 36; Pet. App. 41a.) Respondent objected to the magistrate's recommendation. The district judge, without hearing any evidence, adopted the magistrate's recommendation, adopted the Government's proposed findings as the court's findings and denied the motion to suppress. (R. 42, 46, 54; Pet. App. 33a-34a.)[3]

No other issues were contested. Raddatz waived a jury and the evidence at trial was presented by a stipulation which included Raddatz' statements. (Pet. App. 32a, 35a-37a.) Raddatz was found guilty and sentenced to six months' incarceration and a period of probation of four and one-half years. (Judgment Order of June 15, 1978.)

The United States Court of Appeals for the Seventh Circuit, in a unanimous decision, reversed and remanded

[3] Two days after the magistrate transmitted his report and recommendation to the district judge who had ordered the reference, the case was transferred to a judge who had just joined the court. (R. Nov. 7, 1977.) Respondent's proposed findings of fact and conclusions of law were treated as objections. (Tr. Jan. 26, 1978, at 5.) At a later date, respondent was given leave to file a document specifically designated as objections. (R. 44-46.)

the case for a hearing on the motion to suppress before the district court. The court of appeals' decision consisted of a number of interrelated holdings:

(1) The court of appeals found that the Magistrates Act, in particular §28 U.S.C. §636 (b) (1) (C), required the district judge to make a de novo determination of contested aspects of the magistrate's report. The court held that because the Act required a de novo determination, it did not violate Article III of the Constitution. (Pet. App. 14a.)

(2) The court of appeals reviewed the record of the suppression hearing – the same record that was before the district court. It outlined the conflicting evidence at length and concluded that in the circumstances of this case, the district judge could not make a reliable de novo determination of the contested issues without the benefit of seeing and hearing the witnesses testify. The court observed, "The record here does not reveal a pattern of facts that exposes the defendant's testimony as wholly incredible. Thus the truth cannot be derived from this written record without an intolerably high margin of error . . . ." (Pet. App. 2a-7a, 18a.)

(3) The court of appeals found that Congress did not require the trial court to decide the motion on the basis of record review alone, but gave the court the power to recall witnesses. Hence, it held, the Act itself does not violate due process. (Pet. App. 24a.) Because of the importance of credibility to the determination of the motion in this case, however, the district court could not "exercise its discretion to refuse to hold a hearing on contested issues of fact . . ." consistently with the demands of due process. (Pet. App. 2a-7a, 19a, 24a.)

STATEMENT OF FACTS

The only evidence taken in this case, besides the trial stipulation, was taken at the suppression hearing before the magistrate.

1. The Evidence at the Suppression Hearing

The Government's statement of facts indicates that there was a conflict between the testimony of Raddatz and the two federal agents who testified at the hearing. The Government fails to report, however, significant discrepancies in the agents' testimony which not only cast doubt on their credibility, but make it virtually impossible to determine – even if the Government's evidence alone is considered – what the agents told Raddatz and what led to Raddatz' statement of January 12, 1977. These discrepancies must be considered in determining whether the district court could make a meaningful determination of the facts based solely on the record. A fuller exposition of the evidence than that contained in the Government's brief is therefore essential.

On August 8, 1976, Chicago police officers Monroe Vollick and James Bach arrested Raddatz for possession of a firearm. (Tr. 13, 19.) A formal charge based on this incident was filed against Raddatz in the state court. The state gun charge remained pending until February 22, 1977, when it was dismissed. (Tr. 20, 156-157, 249.)

On November 19, 1976, two federal firearms agents, Paul Russell and Richard McCulloch, went to Raddatz' home to question him. Prior to this date, through discussions with Officers Vollick and Bach and telephone calls to the state court, the agents had learned of the pending state gun charge. (Tr. 38-39.) The agents had also determined, in an interview with Officer Vollick on November 4, that he had recovered the firearm involved in that

charge from Raddatz' possession. (Tr. 174.) The agents had also learned that Raddatz was a convicted felon and that the firearm with which he had been arrested had previously moved in interstate commerce. (Tr. 175.)

Raddatz testified concerning the events of November 19 as follows: When Agents Russell and McCullock came to his home, they introduced themselves and Agent Russell read him rights from a card. Agent Russell told him that the agents had information that the gun with which he had been arrested had been used in a homicide in another state and that they were seeking his cooperation in telling them how he had obtained it. (Tr. 107.) Agent Russell also told him that a federal indictment was going to be handed down against him, but if he agreed to assist the agents, "somebody would talk to the prosecutor, and it would be dismissed." If he failed to cooperate, Agent Russell told him, he could find himself "going to the Federal penitentiary for a long time." (Tr. 103-108.) Agent Russell also talked to him about the possibility of his becoming a firearms informant, and told him that if he worked for the agents on an ongoing basis, he would be paid and his family would be relocated. (Tr. 108-109.)

Raddatz stated that he told the agents on November 19 that he had gotten the gun from Jimmy Batson.[4] He testified that this was not truthful information, but he said it because he was unsure whether he should trust the agents. (Tr. 110-111.) He testified that the agents left a card with him, and that after he "had thought about what they told me," he decided "[t]o help myself, as they said they would help me." (Tr. 111.)

[4] Raddatz was with Jimmy Batson when he was arrested by the local police on August 8. (Tr. 8.)

Accordingly, on what was determined to have been January 12, he called the agents. They picked him up and brought him downtown. (Tr. 111-112.)[5] Raddatz testified as follows concerning his meeting with the agents on January 12:

Q. Did you make a statement on that occasion concerning the gun?

A. Yes, I did.

Q. Was it the same statement you had given earlier or a different statement?

A. Different statement.

Q. Why did you make that statement?

A. Because of the promise they made to me.

Q. Now, on that occasion was there any discussion again about that promise?

A. Yes, there was.

Q. What was that?

A. From Mr. Russell.

Q. What did he say?

A. He asked me what I had for him, and I first asked him, 'What you are going to do for me, is it real?' He said yes . . . . (Tr. 113.)

Raddatz explained that he gave the January statement because of what the agents told him on the earlier occasion at his home:

[5] The agents testified that Raddatz was advised of his rights on January 12. However, both testified that had he been so advised, the typed version of his statement would so indicate. (Tr. 182, 205.) Agent Russell, who reduced the January 12 statement to writing, acknowledged that the typed version does not so indicate. (Tr. 183.)

> [T]hey told me to think about this, that it would benefit me if I did cooperate – when this Federal indictment would be handed down it would be dismissed if I would cooperate with them and give them knowledge as to this gun. (Tr. 123.)

Raddatz testified that on a subsequent occasion, he gave the agents information about someone he knew who was involved in guns and took Agent McCulloch to a place where "[g]uns were being sold on the streets." (Tr. 114-115.) On another occasion, he called the agents and they told him to come downtown. He did so, accompanied by his former wife and her children. On that occasion, he met with the agents' supervisor and was given $50. (Tr. 120, 122.)

Both agents were called by the Government in rebuttal.[6] Their respective testimony as to the reason for seeking to talk to Raddatz on November 19 differed. Agent Russell stated that the agents were investigating a homicide:

> This gun – last known owner of this gun was Mr. Hurley. So we went to talk to Mr. Raddatz to ascerhe was deceased – a victim of an unsolved homicide. This gun – last known owner of this gun was Mr. Hurley. So we went to talk to Mr. Raddatz to ascertain where he got it . . . and also, you know, anything that we could find out about it. (Tr. 168.)

Agent McCulloch testified, however, that the purpose of the interview was to attempt to induce Raddatz to provide the agents with the only information they lacked for a §922 (h) prosecution against him – "venue":

---

[6]Agent Russell had also testified briefly prior to Raddatz' testimony. (Tr. 33-48.)

> Q. So it is correct, is it not, that at the time you and Agent McCulloch [sic] went out to Herman Raddatz' home on November 19, that the only thing you were lacking for a 922 (h) prosecution of Mr. Raddatz was venue; that is where it was that he received the gun?
>
> A. Right. It's known procedure in cases like this that the agents from ATF interview the subject to determine venue. (Tr. 215.)

Contrary to Raddatz' testimony that the agents told him he was going to be indicted, Agent Russell persistently denied that on November 19 he viewed Raddatz as a potential target of a federal prosecution. He denied that he told Raddatz on November 19 that he would be indicted, stating that as of November 19, "I had no case." Raddatz became a target of a potential prosecution, Russell testified, only after his statement of January 12, (Tr. 183-184, 168-169, 175-176, 178.)

Agent Russell denied that he ever discussed cooperation with Raddatz relative to this or any other case. (Tr. 160-161.) He stated that while he talked to Raddatz about the history of the gun with which Raddatz was arrested, he never talked to Raddatz about setting up gun transactions or providing information about gun sales in the City of Chicago. (Tr. 185.)

At other times during the hearing, however, Agent Russell testified, only after his statement of January 12. November 19 about Raddatz' criminal liability, about cooperation and "helping himself." Agent Russell testified that he told Raddatz on November 19 that he "was investigating the incident that occurred on August 8, and also the weapon, as to where he had acquired it." (Tr. 41.) He testified:

> We asked him if he knew where Batson had gotten the gun. He said he did not know. We asked him if he could find out. Because he was involved in the case it would help his chances if he helped us find out where he had gotten it from, and any other gun. (Tr. 42.)

And later, he commented that he told Raddatz that if Raddatz cooperated in helping the agents find Batson:

> I would mention it to the United States Attorney, that he had assisted us in the case, in the event the case developed at that time. It was still in the investigative stages. (Tr. 165.)

Despite Agent Russell's insistence that he "had no case" against Raddatz on November 19, Agent McCulloch testified that on November 19 Agent Russell told Raddatz that he had been in violation of federal law when he was arrested with a firearm on August 8. (Tr. 217-218.) While he could not recall Agent Russell's exact words or whether or not Raddatz was expressly informed that he would be indicted, he remembered that Raddatz acknowledged that he was in serious trouble. (Tr. 218-219.)

Following the November 19 interview, when according to Agent Russell's testimony Raddatz was not a target, the agents proceeded to prepare their §922 (h) case. They obtained copies of Raddatz' fingerprints from the Chicago police in order "to prove that he was indeed the same individual that had the gun on August 8, and that he was a convicted felon." (Tr. 217.) Agent McCulloch testified that the agents took this step in preparation for a §922 (h) prosecution. (Tr. 217.)

Between November 19 and January 12, Raddatz called the agents on numerous occasions. (Tr. 45, 206-207.)

They finally got together on January 12. Agent Russell testified that this visit was completely unsolicited. (Tr. 187.) Raddatz retracted his previous statement and provided the agents with detailed information concerning the prior history of the firearm. (Tr. 179-181, 198-199.) Agent Russell testified that on that occasion, he gave Raddatz $10 to use in gathering information. (Tr. 162.) Agent McCulloch testified that Raddatz gave him information about someone he knew who was selling guns and he and Raddatz went to the area of the city where Raddatz told him this person could be found. (Tr. 199-200, 229.)

According to Agent Russell, it was then, January 12, that the decision was first made to prosecute Raddatz for a firearms violation. (Tr. 168-169.) It was at the same time, according to Agent McCulloch, that Raddatz was first solicited to work for the agents as an informant. (Tr. 199-200, 248.)

While Agent Russell denied talking to Raddatz about providing assistance to the agents beyond giving them information about his gun, Agent McCulloch testified that on January 12, he and Agent Russell talked to Raddatz "about wanting to talk to these other individuals from whom he obtained the firearms and any other firearms that we may be interested in." (Tr. 199.) Agent Russell testified that he was aware of no discussions with Raddatz about the possibility that he might become an informant for the Bureau of Alcohol, Tobacco and Firearms. (Tr. 184-185.) Agent McCulloch testified that such a discussion took place on January 12. (Tr. 199.) Indeed, Agent McCulloch implied that such a discussion took place at the November 19 interview:

> Q. Did you tell Mr. Raddatz, on November 19, that you would appreciate his cooperation in showing you where he got the firearms with which he was arrested?

A. Yes, I believe we did.

Q. So Agent Russell told Mr. Raddatz that the government would consider his help in locating the origins of the firearm if he got his cooperation?

A. I don't know if he stated it that way, but we did ask his cooperation and obtained [in obtaining?] information regarding the firearm.

Q. And he did give you information regarding that firearm, did he not?

A. Yes, he did, on the 12th of January.

Q. Was that cooperation made known to the United States Attorney before the indictment? [Objection interposed.] That piece of cooperation, or that fact of cooperation, was that made known to the United States Attorney?

A. That was not the type of cooperation that we had been speaking to Mr. Raddatz about.

Q. What type of cooperation were you speaking to Mr. Raddatz about?

A. We talked to Mr. Raddatz concerning becoming an informant. (Tr. 236-237.)

Moreover, Agent McCulloch testified that on January 14, 1977, Raddatz brought his former wife to the agents' office and requested that the agents (Agent McCulloch and his supervisor, Agent Hart, were present) explain to her that the agents were seeking his cooperation. Agent McCulloch testified that "Agent Hart explained the situation to her that we were seeking his cooperation" and they discussed "the fact that we would reimburse him for travel and expenses and if he made a case there would be more money involved." (Tr. 248.) Agent McCulloch testified that on January 14, Agent Hart told Raddatz that he was going to be indicted. He stated that he believed Raddatz was aware of this before he came in on January 14. (Tr. 222, 241-242.) According to Agent McCulloch, on this occasion Raddatz repeated his January 12 statement, was given additional cash (this time $50) and was given instructions on introducing the agents to gun dealers. (Tr. 203, 207-208, 224, 228-229, 237, 248.)

2. The Magistrate's Report

The magistrate's report does not mention any conflicts in the agents' testimony. The Government's Proposed Findings of Fact, which the magistrate recommended be adopted and which were adopted by the district court as its findings, do not allude to them. Neither discusses Raddatz' contentions or his testimony. In fact, the issues of what if anything the agents told Raddatz about his legal jeopardy; why they told him they were seeking information about the prior ownership of the gun; what if any discussions were had about Raddatz becoming an informant; when any such discussions occurred; and what expectations Raddatz had when he made his statement on January 12, are never adverted to by the magistrate or in the Government's Proposed Findings. The undisputed cash payments are not mentioned. The magistrate nowhere discusses demeanor. Rather, his brief report states, without explanation of his reasoning, "I find the testimony of the Alcohol, Tobacco and Firearms agent [sic] more credible, with reference to other matters raised by defendant; I find that the Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated." (Pet. App. 41a.)

3. The District Court's Decision

The district court, in a brief memorandum order, denied the motion to suppress, stating its reasons as follows:

> [H]aving read the transcript of the hearing on the motion to suppress, the proposed findings of fact, conclusions of law, and memoranda in support thereof as submitted by both sides, the report and recommendation of the magistrate, and after hearing the arguments of the parties, the court hereby accepts the recommendation of the magistrate and adopts the Government's Proposed Findings of Fact as the court's findings. The court further finds that the three statements given by the defendant and sought to be suppressed were made voluntarily.

(Pet. App. 34a.)

SUMMARY OF ARGUMENT

1. This case should be decided on statutory grounds. Section 636 (b) of the Federal Magistrates Act ("the Act"), under which the magistrate reference in this case was made, required the district judge to "make a de novo determination of those portions of the [magistrate's] report or specified proposed findings or recommendations to which objection [was] made." 28 U.S.C. §636 (b) (1) (C).

The term "de novo" has an accepted and well-understood meaning. It requires fresh and independent consideration of the issues. *See Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 23 (1974). Often de novo review can be accomplished by review of a record, but where the testimony of witnesses is conflicting and credibility is crucial, a de novo decisionmaker must hear the witnesses testify so that he can observe their demeanor and assess their credibility. *See, e.g., Weahkee v. Perry*, 587 F.2d 1256, 1267 (D.C. Cir. 1978); *see also Agosto v. INS*, 436 U.S. 748, 756-757 (1978).

The legislative history of §636 (b) (1) (C) indicates that Congress was fully aware that as a consequence of requiring the district judge to make a de novo determination of contested issues, the district judge in some cases would have to hear the witnesses himself. *See* H.R. Rep. No. 94-1609, 94th Cong. 2d Sess. 3 (1976).

2. The question of due process arises in this case only if the Magistrates Act is interpreted to authorize a district judge to make a de novo determination of credibility issues without seeing and hearing the witnesses testify. The testimony in this case was conflicting, and, as the court of appeals pointed out, the transcript of the hearing before the magistrate provided no basis for a meaningful assessment of credibility. (Pet. App. 18a). In these circumstances, a vast body of precedent dictates that a reliable determination of the issues cannot be made by a decisionmaker who has not observed the witnesses' demeanor in testifying. *See e.g., United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952).

In light of the factors this Court has developed to determine what process is constitutionally required in administrative proceedings, it is manifest that the district judge was constitutionally required to hear the witnesses in this case. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *First*, respondent's individual interest – his Fifth Amendment right against self-incrimination – is a compelling one. Moreover, in this case, as in many, resolution of the motion to suppress determined the outcome of the case. *See Gannett Co., Inc. v. DePasquale*, ___ U.S. ___, 99 S. Ct. 2898, 2914 n. 1 (Powell, J., concurring). *Second*, there is a substantial risk of an erroneous depri-

vation of this interest; a district judge cannot accurately determine credibility issues of the nature of those raised by respondent's motion to suppress without considering the witnesses' demeanor. *Third*, no significant interest of the Government is impaired by a requirement that the district judge hear witnesses whose credibility is critical to the determination of a motion to suppress. This requirement will not result in the exclusion of properly obtained evidence, nor will it make more difficult for the Government to prevail in a proper case. In addition, only minimal savings in judicial resources would result if district judges were permitted to decline to rehear witnesses in cases like this one.

3. If §636 (b) (1) (C) of the Magistrates Act is construed according to its terms to require an independent determination of contested issues by a judge of the district court, the Act does not violate Article III of the United States Constitution. The Government has argued, however, that de novo consideration is not required by the Constitution and "that there is no Article III impediment to the creation of an Article I magistrate's court to decide suppression motions." (Gov. Brief at 37.)

These arguments are incorrect. Congress may create legislative tribunals only in the exercise of its specific legislative powers. *See Palmore v. United States*, 411 U.S. 389, 407-408 (1973); *Reid v. Covert*, 354 U.S. 1, 20-21, 42, 66 (1957). Congress' Article I, §8, cl. 9, power " '[t]o constitute Tribunals inferior to the supreme Court,' plainly relates to the 'inferior Courts' provided for in Art. III, §1; it has never been relied on for establishment of any other tribunals." *Glidden v. Zdanok*, 370 U.S. 530, 543 (1962).

The Government's Article III arguments deflect attention from the significant consequences of Congress'

decision to vest jurisdiction over this case in an Article III trial court. That Congressional choice of forum entitled respondent to the constitutional attributes of that forum, specifically, a judge whose independence is protected by the provisions of Article III. *See Glidden v. Zdanok, supra* at 533-534, 536; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-16 (1955).

ARGUMENT

I.

THE FEDERAL MAGISTRATES ACT GAVE RADDATZ THE RIGHT TO A DE NOVO DETERMINATION OF CONTESTED ISSUES BY A JUDGE OF THE DISTRICT COURT.

Section 636 (b) (1) (A) of the Federal Magistrates Act, 28 U.S.C. §636 (b) (1) (A), authorizes district court judges to refer to a magistrate, for hearing and determination, any "pretrial matter" except eight enumerated case-dispositive motions.[7] These eight case-dispositive motions,[8] along with post-confiction petitions and "prisoner petitions challenging conditions of confinement," may also be referred to a magistrate, but the Act explicitly limits the power of the magistrate in these case-

[7]Review of the magistrate's decision on §636(b)(1)(A) matters may be sought in the district court. The magistrate's decision can be set aside if "clearly erroneous or contrary to law."

[8]The eight enumerated motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

dispositive matters to making proposed findings of fact and recommendations for disposition by the district judge. §636 (b) (1) (B). *United States v. Edwards*, 602 F.2d 458, 466-467 (1st Cir. 1979). If any party objects to any aspect of the magistrate's report or recommendation, the Act directs that "a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." §636 (b) (1) (C). This statutory directive, under the circumstances of this case, required the district court to rehear the testimony before deciding Raddatz' motion to suppress.

A. A De Novo Determination Means An Independent Determination Unprejudiced By The Magistrate's Suggested Findings.

When Congress uses a legal term like "de novo" in a statute, courts are to presume that Congress used the term in its accepted legal sense. *Agosto v. INS*, 436 U.S. 748, 754 (1978); *Bradley v. United States*, 410 U.S. 605, 609 (1973). This rule of interpretation has particular force when Congress specifies a standard of judicial review, because in this area, Congress and the courts share a well-understood common vocabulary. *See Chandler v. Roudebush*, 425 U.S. 840, 862-863 n. 37. (1976).[9]

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[9] In *Chandler*, the Court stated that "[i]n most instances . . . where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like 'substantial evidence' . . . ." 425 U.S. at 862 n. 37. This observation is confirmed in recent amendments to the Magistrates Act which provide that magistrates may try civil cases with the consent of the parties. Appeal may be had to the court of appeals "in the same manner as an appeal from any other judgment of a district court" or, when the parties consent, to the district court. In the latter case, the Act specifies that the appeal shall be "*on the record* to a judge of the district court in the same manner as on appeal

[footnote continued]

Where Congress expressly sets forth a particular standard of review, this Court strictly enforces its application by the lower courts. In *Chandler v. Roudebush*, for example, this Court found that Congress gave federal employees the right to a de novo judicial determination of their employment discrimination claims, even though a substantial evidentiary record had been developed in prior administrative proceedings. This Court rejected the approach taken by a number of courts of appeals that a district judge could insist on a showing by the plaintiff that a trial de novo would serve some useful purpose. 425 U.S. at 859-861. The Court held that by specifying review de novo, Congress denied the district court discretion to consider the case in any other manner. 425 U.S. at 861-862 and n. 37.

The term "de novo" has a common and accepted legal meaning. *See Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 892 (D.C. Cir. 1979) (on petition for rehearing). As federal courts have repeatedly held, the essence of de novo review is an independent determination of the issues, without deference to any prior resolutions of the issues. Thus, in *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974), the Court observed that such a proceeding would be "unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence." 415 U.S. at 23. *Accord, Goodman v. United States*, 518 F.2d 505, 509 (5th Cir. 1975) ("The phrase 'de novo' means 'the court should make an independent

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from a judgment of the district court to a court of appeals." Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643, §636 (c) (3) and (c) (4), *amending* 28 U.S.C. §636 (c). (Emphasis added.)

determination of the issues.' "); *Service Arms Co., Inc. v. United States*, 463 F. Supp. 21, 23 (W.D. Okla. 1978) ("[T]he administrative decision is not entitled to any presumption of correctness or other advantage."). Indeed, the Government does not contend otherwise. It agrees that the statutory requirement of a de novo determination by the judge precludes the judge from deferring to the magistrate's assessment of the testimony. (Gov. Brief at 43.)

Thus, by using the term "de novo," the Act directs the district court to make its own independent determination of the issues. The Government argues that there is some significance in the Act's use of the term "de novo determination" rather than "de novo hearing." (Gov. Brief at 22.) The interchangeable use of these terms in the decisional law demonstrates, however, that this is a distinction without a difference. *See, e.g., Agosto v. INS, supra,* 436 U.S. at 751, 753 (1978). This Court has so held. In *United States v. First City National Bank,* 386 U.S. 361 (1967), where the relevant statute provided that "the court shall review de novo the issues presented," this Court squarely rejected the argument that "the use of the word 'review' rather than 'trial' indicates a more limited scope to judicial action":

> The critical words seem to us to be "de novo" and "issues presented." They mean to us that the court should make an independent determination of the issues.

386 U.S. at 368.

The Government's argument that the term "de novo determination" does not necessarily require a rehearing of evidence (Gov. Brief at 23) is thus correct, but it is inconsequential. The issue before the Court is not whether a district court must invariably rehear the evi-

dence in making a de novo determination under §636 (b)(1)(C). Rather, the issue is whether the district court had to hold an evidentiary hearing to make a de novo determnation in this case because it had to make credibility choices from the conflicting testimony of the witnesses. The court of appeals held that in this case, where an assessment of the credibility of witnesses was critical to the determination of a motion to suppress, due process required the judge to rehear the witnesses. That decision, based on constitutional grounds, is fully sustainable as a matter of statutory construction.

The courts have repeatedly held that when a statute requires a judge to make a de novo determination and credibility is crucial, he may adequately consider demeanor evidence only by observing the witnesses testify. In *Pignatello v. Attorney General of the United States,* 350 F.2d 719 (2d Cir. 1965), the issue before the court of appeals was whether it could make a de novo determination of citizenship based on the record of an INS hearing, or whether it had to remand the case to the district court for the taking of evidence. Noting that the petitioner was entitled to "a de novo judicial determination of the claim, not judicial review of the administrative disposition of that claim," 350 F.2d at 723, and that the case presented "delicate issues of credibility that could only be resolved with the benefit of live testimony," the court of appeals remanded the case to the district court for an evidentiary hearing. *Id.*

In *Hackley v. Roudebush,* 520 F.2d 108 (D.C. Cir. 1975), a Title VII case, the court rejected the argument that a de novo hearing is a wasteful duplication of prior agency proceedings. 520 F.2d 149-155. The court concluded that live testimony must be considered when "credibility is an integral component of a material factual conflict." 520 F.2d at 159.

Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978), another Title VII case, involved an appeal from a district court's entry of summary judgment based on evidence in the administrative record, including an investigator's report. The court of appeals reversed, stating:

> [T]he [district] court may not abdicate its responsibility and accord the investigator's report controlling weight simply because it finds substantial evidence to support the investigative determination. Such a view works at cross purposes with Congress' intention that the courts conduct *de novo* proceedings in cases of employment discrimination.
>
> . . . . [U]nder *de novo* review mandated by Congress it is the court's judgment and not the administrator's that is controlling. The court must carefully review the record and make its own independent judgment of the issues as it does in any civil matter tried to the court.

587 F.2d at 1265. The court further held that because motivation, intent, and credibility were highly relevant, the district court would have to consider demeanor, and thus was required to rehear the evidence:

> A *de novo* proceeding is necessary in all Title VII cases. In some cases, the administrative record will be so full and clear andthe issues such that a *de novo* review of the record will be all that is required and summary judgment will be available; but when as in this case the material facts are in dispute and issues of credibility are involved, the court will require additional testimony to supplement the administrative record.

587 F.2d at 1267.

The same result is required here.

B. The Requirement Of A De Novo Determination Of Contested Issues Was Included By Congress With Full Awareness That It Would Necessitate Rehearing In Some Cases.

The Government takes the position that although the Act requires the district judge to make a de novo determination of contested issues, he need never rehear the witnesses, even if the disposition of the motion depends wholly on the evaluation of conflicting testimony. (Gov. Brief at 24.) The Government relies on statements from the legislative history to support this contention. If the legislative history and the judicial decisions which influenced the adoption of the 1976 amendments are more closely examined, however, it becomes apparent that Congress was fully aware that rehearings might be necessary in cases where credibility was crucial, and for that reason, specifically provided for the hearing of witnesses by the district court.

In *Wingo v. Wedding*, 418 U.S. 461 (1974), this Court held as a matter of statutory construction that the Magistrates Act, as enacted in 1968, did not authorize magistrates to hold evidentiary hearings in habeas corpus cases.[10] The Court held, in addition, that the lack of authority was not cured by a local rule requiring that the district judge listen to a tape recording of the hearing and "give it de novo consideration." Listening to a tape recording, the Court observed, is not " 'the equivalent of the judge's own exercise of the function of the trier of the facts.' " 418 U.S. at 467, 474-475, quoting *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).

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[10]Prior to this Court's decision in *Wingo v. Wedding*, two courts of appeals had held that magistrates could hold evidentiary hearings in post-conviction cases, subject to rehearing before an Article III judge if disputed issues of fact developed. *Noorlander v. Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973); *O'Shea v. United States*, 491 F.2d 774, 778 (1st Circ. 1974).

Chief Justice Burger, dissenting, disagreed with the Court's construction of the relevant statutes. He too expressed concern about the judge's ability to assess credibility but concluded that as long as the judge retained the power to hear the witnesses himself, no constitutional problem need be encountered:

> Not only would [the magistrate's] report and recommendation to the district judge be subject to amendment or outright rejection, the district judge could, at the behest of the habeas corpus petitioner or on his own motion, conduct his own evidentiary hearing to judge for himself, for example, the credibility of witnesses if he deems their testimony essential to disposition of the application. To the extent a problem of constitutional magnitude may be foreseen in the particulars of the rules established by a district court, those rules can be construed to comport with constitutional requirements.

418 U.S. at. 487.

The 1976 amendments were proposed by the Judicial Conference in response to the statutory holding in *Wingo v. Wedding. See Jurisdiction of United States Magistrates: Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 1 (1975). But the design of the amendments was influenced as well by the decision of the Ninth Circuit Court of Appeals in *Campbell v. United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974). *See* H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). That decision established a reference procedure which, in keeping with the accepted meaning of de novo, required the judge to make an independent determination of facts and law and authorized him to rehear evidence where necessary to permit him to make a de novo determination of contested issues.

Campbell came to the Ninth Circuit on a petition for a writ of mandamus to prevent the reference of a Fourth Amendment motion to suppress to a magistrate. The reference had been made pursuant to a local rule promulgated under §636 (b), which then provided hat magistrates could be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." The rule did not set forth any standard for review. The referring judge had told the parties that in reviewing a magistrate's report, his "philosophy" was to accept the magistrate's rulings on facts. 501 F.2d at 200.

The Ninth Circuit upheld the reference but expressed its disagreement with the procedure contemplated by the trial judge. Quoting extensively from *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972), the court held that while the magistrate may preside at an evidentiary hearing, "he may not himself decide the motion." 501 F.2d at 206. Hence, the district court "was in error in stating it must accept the findings of the magistrate. The district court has the duty to make the final decision on the facts." 501 F.2d at 207.

Because of the procedural posture of the *Campbell* case, no evidence had been taken and the issue of the scope of review was not concretely presented. Nevertheless, while declining "to discuss the local rules in detail," 501 F.2d at 207, the court set forth guidelines to govern the district judge's review. It held first that "[a] magistrate may not, in a hearing on a motion to suppress, exercise ultimate decision-making power." 501 F.2d at 205. Second, it directed that when a party contests the magistrate's proposed findings of fact, "[t]he court shall make a *de novo* determination of the facts." 501 F.2d at 206.

The court also discussed the procedure on review. The district court would be required to listen to a tape recording of the hearing. It would be empowered to hear evidence if "it finds there is a problem as to the credibility of a witness or witnesses or for other good reasons . . . ."[11] The court left to the judge's discretion the issue of whether he need hear evidence, but it noted that the procedure it announced would solve "the problem of the credibility of witnesses based on observations discussed in *Wingo v. Wedding.*" 501 F.2d at 202, 205-207.[12]

The legislative history of the 1976 amendments makes clear that, in conformity with *Campbell,* Congress did not intend to authorize magistrates to exercise adjudicatory authority with respect to §636 (b) (1) (B) matters. Representative Danielson, speaking on the floor of the House on October 1, 1976, stated:

> It is not intended that a magistrate shall have the power under subparagraph (A) "to hear and determine" such dispositive motions. However, it is intended that under subparagraph (B) a judge of the

[11]Language from *Campbell,* including this discussion of witness credibility, was quoted in the House Report. H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976).

[12]*Campbell* might be read to imply that the district court's discretion is unreviewable. This reading would contradict established principles of federal appellate jurisdiction. *See, e.g., Brown v. Thompson,* 430 F.2d 1214, 1215-1216 (5th Cir. 1970); *see generally LaBuy v. Howes Leather Co.,* 352 U.S. 249, 259-260 (1957). In *United States v. Belculfine,* 508 F.2d 58 (1st Cir. 1974), the court of appeals discussed *Campbell* with approval, but remanded the case before it with instructions for a hearing before the district judge, noting that "the credibility of witnesses is so likely to be determinative, and the evidence so delicately balanced that we see little probability that judicial time would be saved by preliminary reference to a magistrate." 508 F.2d at 64.

> court, in his discretion, may assign such dispositive motions to a magistrate for hearing and recommendation to a judge of the court for ultimate disposition.

122 Cong. Rec. 35181 (1976).

The House Report on the bill explained:

> . . . [S]uch motions, which may be heard by the magistrate, will be determined by the judge, and those portions of findings and recommendations to which objection is made will require a *de novo* determination by the judge.

H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976).

The House Report explained the reason for the inclusion of an express requirement of de novo review in terms wholly consistent with the accepted meaning of de novo:

> The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendation in dispositive and posttrial matters . . . . The amendment states expressly what the Senate implied: i.e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party.

Id.

The legislative history also demonstrates that Congress was clearly advised that if it required de novo review, rehearings would at times be necessary. The Judicial Conference, in explanatory material accompanying its pro-

posed amendment, explained that the inclusion of a de novo review provision would require the judge "to conduct an inquiry into the specific allegations of error in the same manner as if he were hearing the matter initially." *See Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 37 (1975). The Judicial Conference advised that while "proposed section (b) (1) may well generate some duplication of effort in a particular case," it should be adopted. *Id.* It predicted that if magistrates were carefully selected and the bench and bar gained confidence in them, objections would be asserted infrequently. The Conference urged that de novo review be required, whatever the cost in duplication, in order to avoid any potential Article III problems implicit in the delegation of adjudicative power over case-dispositive matters to non-Article III personnel. *Id.* at 35.

The Government correctly asserts that the House Report states that "[t]he use of the words 'de novo determination' is not intended to require the judge to actually hold a new hearing" in the normal case. (Gov. Brief at 26.) But the Government fails to report that the House Report also states, "In some specific instances, however, it may be necessary for the judge to . . . recall witnesses . . ." H.R. Rep. No. 94-1609, *supra* at 3. The Government similarly omits important qualifying language in attempting to demonstrate "Congress' clear understanding" that the words de novo determination do not require the judge to conduct a new hearing. (Gov. Brief at 28.) It quotes material from the Judicial Conference's advisory "Jurisdictional Checklist – Duties Which May be Assigned to United States Magistrates," which was an exhibit to a witness' testimony in 1977 hearings, but omits this language:

> In some specific instances it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings. If, for example, the judge finds that there is a problem as to the credibility of a witness or witnesses in an adversary proceeding. [sic]

Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 37 (1977). *See also* House Report 94-1609, *supra* at 11 ("The bill would permit the court by local rules . . . to specify any procedure for bringing the matter on for a formal hearing, if a formal hearing is to be required.")[13]

This legislative history thus demonstrates, first, that Congress was aware, when it adopted the requirement of a de novo determination, that rehearing of evidence by the court would at times be necessary, especially in cases involving crucial issues of credibility, and second, that it did not intend to restrict the court to record review in such cases.

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[13]The Government contends that if the requirement of a de novo determination itself mandates a rehearing, the provision in the Act giving the judge the power to recall witnesses is surplusage. (Gov. Brief at 23.) For the reasons explained at page 24, *supra*, a de novo determination does not invariably require a new hearing but does so only to the extent that credibility or some other source of material evidence not included in the record is crucial. The reservation of power in the judge to hear live testimony is, rather than surplusage, proof that Congress anticipated that the judge would in some cases have to hear the witnesses himself to make a de novo determination.

C. The Cases Cited by the Government Do Not Support its Argument That Congress Intended to Authorize District Judges to Make Credibility Determinations on the Basis of Review of a Cold Record.

The Government has cited *United States v. Lieberman*, No. 78-1465 (1st Cir. Nov. 7, 1979); *Muhich v. Allen*, 603 F.2d 1247 (7th Cir. 1979); *Orand v. United States*, 602 F.2d 207 (9th Cir. 1979); and *United States v. Whitmire*, 595 F.2d 1303 (5th Cir. 1979), in support of its argument that the de novo determination directive of the Act does not require a new hearing. Respondent, as stated previously, does not contend that in the generality of cases, a de novo determination does require a new hearing. In the circumstances of this case, however, because of the conflicting testimony and the crucial importance of credibility choices in the resolution of the contested issues, a new hearing was necessary. With the possible exception of *United States v. Whitmire*, the cases cited by the Government do not hold to the contrary.

In *Lieberman*, the First Circuit expressly distinguished the Seventh Circuit's decision in the instant case. Recognizing that contested issues of witness credibility could alter the procedure necessary for adequate de novo review, the *Lieberman* court approved record review in the case before it because "[h]ere the magistrate made no such critical credibility judgments." Slip op. at 22 n. 25.[14]

Muhich involved a civil jury trial conducted by a magistrate with the consent of the parties. The jury, not the magistrate, made the determinations of witness credi-

[14]Moreover, the appellant in *Lieberman* "did not object to the initial reference to a magistrate or request an evidentiary hearing before the district judge." Slip op. at 22 n. 25.

bility, as was essential given the parties' Seventh Amendment right to a jury trial.[15] Moreover, the court held that because the parties consented to the reference and failed to file objections to the magistrate's recommendations, they had "voluntarily and knowingly agreed to waive their right to a civil trial before an Article III judge." 603 F.2d at 1251.[16]

No does *Orand* address the issue presented here. *Orand* held that the district judge failed to comply both with the de novo determination requirements of *Campbell*, from which the opinion quotes extensively, 602 F.2d at 208, and with the Magistrates Act.[17] The Ninth Circuit,

[15]In Muhich, the magistrate, besides recommending that judgment be entered on the jury's verdict, also recommended that some defendants' motions for a directed verdict be granted. In ruling on a motion for a directed verdict, the court may not make credibility choices where the testimony is in conflict. *See* 9 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2527 (1971).

[16]In *Hill v. Jenkins*, 603 F.2d 1256 (7th Cir. 1979), argued on the same day as *Muhich*, the Seventh Circuit held that consent of the parties is essential to the reference of any civil trial to a magistrate. The court of appeals reversed the district court's adoption of the magistrate's recommendations because the parties had not consented to the reference and because the district court had failed to conduct a de novo review of proceedings held before the magistrate, as required by the Act. 603 F.2d at 1258.

[17]*Orand* is an example of an apparently not uncommon misuse of the Magistrates Act by district judges. The Ninth Circuit noted the conditions under which the district court had made its purportedly de novo review:

> There were no tape recordings of the evidence and proceedings before the magistrate. The stenographic notes from the magistrate's hearing were not fully transcribed until November 18, 1977, three months after the district court adopted the magistrate's report and recommendation. 602 F.2d at 209.

Hill v. Jenkins, supra, is an even more extreme example of a district court's failure to follow the congressionally mandated standard of review:

[footnote continued]

in connection with its remand instructions, cited the Seventh Circuit's *Raddatz* opinion and its own opinion in *United States v. Bergera*, 512 F.2d 391 (9th Cir. 1975), obviously directing the district court to give consideration to whether it should rehear witnesses on remand. 602 F.2d at 209 n. 5.[18]

In *Whitmire*, the Fifth Circuit did express its disagreement with the decision of the court of appeals in this

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[T]he district court adopted *verbatim* the findings of fact and conclusions of law submitted to him by the appellees, and proceeded to enter an order granting judgment in favor of the appellees. In reaching this determination, the district judge did not have before him any findings or conclusions submitted by the appellant. Nor did the district court have the benefit of the magistrate's findings and recommendations for disposition of the case, as required by Section 636 (b) (1) (C) of the Act, since the magistrate never filed a report on the proceedings with the district court. Consequently, neither party had an opportunity to file objections, if any, to the magistrate's report. Indeed, the district judge did not even have before him the transcript of the hearing, since it was not prepared by the court reporter until after this appeal had been filed. 603 F.2d at 1258–1259.

This problem has not gone unobserved. *See Magistrates Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 160 (1977) (remarks of Hon. Griffin B. Bell).

[18]In *United States v. Bergera*, 512 F.2 391 (9th Cir. 1975), a magistrate recommended that a motion to suppress be granted, but the district judge, exercising an authority ostensibly consistent with the *Campbell* decision, *supra* at pp. 28-30, rejected the recommendation. The Ninth Circuit reversed, holding that unless the district judge hears the evidence himself, the magistrate's recommendations must be adopted. 512 F.2d at 394. *Bergera*, to this extent, is inconsistent with the 1976 amendments which make clear that the judge is not bound by the magistrate's recommendation, that he must make a de novo determination of contested issues and that he is free to accept, reject or modify the magistrate's recommendation, whether or not he rehears the evidence. 28 U.S.C. §636 (b) (1) (C). See p. 52 n. 28, *infra*.

case. 595 F.2d at 1305 n. 1. It does not appear from the court's extensive review of the evidence at the suppression hearing, however, that credibility issues were critical to the disposition of the motion.[19]

Where all the evidence that was before the magistrate is accessible to the judge, the judge can evaluate the quality of the magistrate's report in a menainingful way and make an independent determination of contested issues. *See Mathews v. Weber*, 423 U.S. 261, 274 (1976). But where credibility is critical, a judge who has not observed the witnesses testify must make his decision without knowledge of the witnesses or their demeanor, in cases like this one perhaps the most probative source of evidence available. Neither the legislative history nor the authorities relied on by the Government indicate that Congress intended to authorize this kind of arbitrary and unreliable decisionmaking in important, case-dispositive matters.

II.

IN DECIDING RESPONDENT'S MOTION TO SUPPRESS AN INVOLUNTARY STATEMENT, THE DISTRICT JUDGE COULD NOT MAKE AN INDEPENDENT ASSESSMENT OF THE WITNESSES' CREDIBILITY, IN A MANNER CONSISTENT WITH DUE PROCESS, WITHOUT HEARING THEM TESTIFY.

This case should be resolved on statutory grounds for the reasons set forth in Section I above. The Magistrates

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[19]The Court should be aware of a recent case not cited by the Government in which the Eighth Circuit upheld an order of a district court directing enforcement of an IRS summons based on the recommendations of a magistrate. *United States v. Miller*, No. 79-1226 (8th Cir. Oct. 30, 1979). The court rejected the contention that §636 (b) (1) (B) requires the judge to hold "a full hearing *de novo*." Slip. op. at 8-9. The court noted, however, that neither the Government nor Miller presented oral testimony before the

[footnote continued]

Act directs that a "de novo determination" be made of each contested finding of a magistrate; the "de novo" standard requires an independent assessment of the facts; and the district judge in this case could not make such an assessment without hearing the witnesses. The Government concedes that the Act requires a district judge to make an independent decision and that he cannot do so by deferring to a magistrate's evaluation of testimony. (Gov. Brief at 43.)[20] Yet the Government contends that an independent decision can be made by what it terms a "thorough" review of the record. (Gov. Brief at 49.) Under this interpretation of the Act, the constitutional question arises: can a district judge who has not observed the witnesses make an independent determination of their credibility sufficiently reliable to comport with due process?

In conformity with one of the basic principles of our legal system, the court of appeals ruled below that, given the nature of the issues presented by this case, due process required the decisionmaker to hear the witnesses. This conclusion is fully supported both by decisions involving judicial proceedings and by the factors outlined by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what process is due in non-judicial proceedings.

The Government defends the manner in which the district court decided Raddatz' motion in two ways. First, it asserts that Raddatz' testimony at the suppression hearing before the magistrate was so inherently incredible that demeanor evidence was unimportant. (*See* Gov. Brief at 42 n. 28, 54-55.) However, as the court of appeals expressly found, based on its own review of the record, Raddatz' testimony was not inherently incredible, and the testimony of the Government agents was seriously in conflict. (Pet. App. 5a-7a, 18a.)

Second, the Government contends that even if demeanor evidence is critical, the procedures employed here would satisfy due process. The magistrate, the Government points out, sees the witnesses and proposes factfindings. As long as the district court comes to the same conclusions based on record review, then contends the Government, the losing party has had two substantial opportunities to prove his case and no basis for complaint. (Gov. Brief at 43-44, 49-50.) Only if the record review results in a disagreement with the magistrate does the Government allow that rehearing may be necessary. (Gov. Brief at 53-54.) The fault in the Government's argument is that, where demeanor evidence may be dispositive, record review does not allow an accurate evaluation of credibility. The district judge in this case had no basis for a decision to agree or disagree with the magistrate.

If the issue of due process need be reached, the decision of the court of appeals on this issue is manifestly correct.

A. The Record Does Not Demonstrate That Respondent Was Untruthful.

The Government argues that the testimony of the federal agents was "inherently more credible" than Raddatz' testimony and hence, the district judge was entitled to resolve the conflicts in the testimony of the witnesses against Raddatz without considering demeanor.

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magistrate (Miller "reiterated the objections made in his answer") and Miller declined the opportunity to question the Government agent. Slip. op. at 3. Thus the case involved no issue of witness credibility.

[20] Article III of the United States Constitution also requires that the determination of a motion to suppress a confession be made independently by the district court. See pp. 60-66, *infra*.

(Gov. Brief at 54-55.) In support of this assertion, the Government relies on Raddatz' prior criminal record, Raddatz' admission that he once gave untruthful information to two federal agents and the "consistent and corroborating" testimony of these agents.[21] The court of appeals concluded, to the contrary, that demeanor was indispensable to a determination of the issues in this case.

The fact that an individual has a criminal record cannot create a presumption that he will not testify truthfully under oath. Since the judge has a readily available means of deciding accurately whether a defendant is credible by considering his demeanor, presumption would be irrational and violative of due process. *See Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 644-645 (1974): *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972).

Raddatz' testimony was straightforward. He testified consistently as to what he did, and why he did it. He testified that the information he first gave to the agents

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[21]The Government asserts that *three* law enforcement officers gave "consistent and corroborating" testimony. (Gov. Brief at 55.) The testimony of Officer Vollick, one of the three, dealt only with Raddatz' arrest on August 8, 1976. Officer Vollick was not present at the interviews on November 19 and January 12, which were at issue in the suppression hearing, and the federal agents were not present on August 8.

With respect to the August 8 arrest, the Government argues that Raddatz' testimony was "implausible." (Gov. Brief at 55.) It was not. The testimony of Officer Vollick, who alone contradicted Raddatz, was, at best, confused. Indeed, the confusion in his testimony forced the Government to posit alternative theories of what occurred in its proposed findings of fact. (App. 6, finding "d.") While the Government asserts that Vollick's testimony was corroborated by the police report (Gov. Brief at 43 n. 28), the police report was never admitted into evidence, its contents were never disclosed, and the author of the report, Officer Bach, was never called as a witness. (Tr. 14.)

was untrue but that the information he subsequently provided was truthful. (Tr. 110-111, 133.) The Government has never contended otherwise. He never equivocated about the promise he had received from the agents that the forthcoming federal indictment would be dismissed in exchange for his cooperation.

By contrast, the testimony of the agents, as the court of appeals observed, was not forthright and consistent. (*See* Pet. App. 6a-7a.) The substance of their testimony was in conflict on a number of critical issues, including the following:

1. Agent Russell denied that Raddatz himself was an object of investigation on November 19. (Tr. 175-176, 177-178, 183-184.) Russell testified that his interest shifted from an investigation of the gun to an investigation of Raddatz for purposes of a federal prosecution only after Raddatz' statement of January 12. (Tr. 168-169.)

Agent McCulloch testified, however, that the agents' purpose in interviewing Raddatz on November 19 was to obtain an admission for use in a §922 (h) prosecution against him. (Tr. 215-216.)[22]

2. Agent Russell denied that he told Raddatz on November 19 that he might be indicted, stating, "I had no case." (Tr. 183-184.) Agent McCulloch testified, however, that Agent Russell himself told Raddatz, on November 19, that Raddatz had violated federal law when he was arrested on August 8. (Tr. 217-218.) Although Agent McCulloch could not recall whether Agent

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[22]McCulloch's account was corroborated by the agents' conduct between November 19 and January 12, when they collected documentary evidence supporting a §922 (h) indictment. (Tr. 217.)

Russell explicitly told Raddatz he would be indicted, Agent McCulloch believed Raddatz must have known this prior to January 14. (Tr. 218-219, 241-242.)

3. Agent Russell, on the Government's direct examination, testified that he had never discussed cooperation with Raddatz:

> Q. During that period [November 19 through January 12] did you have any discussion with Herman Raddatz with regard to his possible cooperation with the Government?
>
> A. Relative to this case?
>
> Q. Yes.
>
> A. No.
>
> Q. Relative to any case?
>
> A. No, sir. (Tr. 161.)

On cross-examination, however, his testimony changed:

> Q. So there had been some discussion between you and Mr. Raddatz on November 19 about his possibly cooperating one way or another with ATF?
>
> A. Only to the location – my conversation with him was to the location of Batson.
>
> Q. Right. What reason did you give him for which he might want to cooperate with you?
>
> A. I would mention it to the United States Attorney, that he had assisted us in the case, in the event the case developed at that time. It was still in the investigative stages. (Tr. 165.)

4. As noted above, Agent Russell testified that the only cooperation the agents requested of Raddatz on

November 19 was assistance in tracing the origin of the gun with which he had been arrested and that any cooperation Raddatz provided would be brought to the attention of the United States Attorney. Agent McCulloch provided a different version:

> Q. So Agent Russell told Mr. Raddatz that the government would consider his help in locating the origins of the firearm if he got his cooperation?
>
> A. I don't know if he stated it that way, but we did ask his cooperation and obtained information regarding the firearm.
>
> Q. And he did give you information regarding that firearm, did he not?
>
> A. Yes, he did, on the 12th of January.
>
> Q. Was that cooperation made known to the United States Attorney before the indictment? [Objection interposed.] That piece of cooperation, or that fact of cooperation, was that made known to the United States Attorney?
>
> A. That was not the type of cooperation that we had been speaking to Mr. Raddatz about.
>
> Q. What type of cooperation were you speaking to Mr. Raddatz about?
>
> A. We talked to Mr. Raddatz concerning becoming an informant. (Tr. 236-237.)

In sum, the testimony of the two agents did not provide a coherent account of why they first interviewed Raddatz, what they said to him on that occasion, and why he came to see them in January with the only information they needed to indict and convict him. If the record objectively establishes anything, it is that the

agents' testimony was not "consistent and corroborating," and that the court of appeals was correct: "[T]he truth cannot be derived from this written record without an intolerably high margin of error . . . ." (Pet. App. 18a.)

B. Record Review Of The Hearing Before The Magistrate Provided The District Court With No Basis For Determining Credibility Adequate To Meet The Requirements Of Due Process.

1. An unbroken tradition of decisions involving judicial proceedings directs that the trier of fact must observe the witnesses in order to assess their credibility accurately.

In *Rouse v. United States*, 359 F.2d 1014 (D.C. Cir. 1966), a suppression motion was decided in a manner analogous to the decision in the present case. The motion was initially presented to a motions judge before trial; in the pretrial hearing serious conflicts in testimony developed. The motions judge declined to suppress the evidence, but he indicated that the defendants should have a right to renew their motion at trial. However, when the motion was presented to the trial judge, he denied it on the basis of a review of the transcript of the hearing, without rehearing any evidence. The court of appeals reversed. In his concurring opinion, Judge McGowan stressed that the trial judge could not effectively determine credibility from the written record:

> To resolve properly an issue of credibility of the kind involved in this case, the judge who finally decides the suppression question must see and hear the clashing witnesses.

359 F.2d at 1017.

That is the principle which the court of appeals applied in the present case. Unless the ultimate decisionmaker

sees and hears the witnesses, he cannot make a reliable independent judgment of their credibility. There is no more pervasive principle in our law.

Over one hundred years ago, in *Regina v. Bertrand*, 4 Moo. P.C. (N.S.) 460, 481 (1867), Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading notes of the witnesses' previous testimony:

> The most careful note must often fail to convey the evidence fully in some of its most important elements . . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . it is . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.

For this reason, it has become axiomatic that federal appeals courts cannot make de novo determinations of facts found by a trial court, especially when credibility is in question. Rule 52 of the Federal Rules of Civil Procedure allows reversal of a trial court's findings of fact only when they appear "clearly erroneous," a standard explained by this Court in *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952), quoting *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930):

> Face to face with living witnesses the original trier of fact holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong? We never saw the witnesses.

See also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) ("[A]ppellate courts must

constantly have in mind that their function is not to decide factual issues *de novo*"); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.").[23]

In other contexts as well, the courts have repeatedly affirmed that the ultimate decisionmaker on issues involving credibility must observe the witnesses. When a trial judge resigns or dies, after the conclusion of trial, without filing findings and conclusions, his successor may not resolve factual disputes by reading the trial transcript, but must hold a new trial. *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *United States v. Nugent*, 100 F.2d 215, 217 (6th Cir. 1938) *cert. denied*, 306 U.S. 648 (1939) ("[B]y universal practice and tradition [factual] findings are based upon personal observation of the witnesses . . . . . "). *See* 7 J. Moore, *Federal Practice* §63.05 at 63-9 (1978 ed.) ("A successor judge is in no position to pass on the credibility of witnesses whom he has not seen."). Similarly, in deciding whether to impose contempt sanctions for failure to comply with court orders, a district court must hear testimony, rather than entering judgment on the basis of affidavits. *Sanders v. Monsanto Co.*, 574 F.2d 198, 200 (5th Cir. 1978).

The force and pervasiveness of the principle that the trier of fact must observe the witnesses is grounded on

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[23]The decisions of courts of appeal requiring deference to the factfindings of the trial court are legion. *See, e.g., Dowell v. United States*, 553 F.2d 1233, 1235 (10th Cir. 1977); *Palermo v. Warden, Green Haven State Prison*,545 F.2d 286, 293 (2d Cir. 1976); *United States v. Reddoch*, 467 F.2d 897, 898 (5th Cir. 1972); *Baker v. United States*, 343 F.2d 222, 224 (8th Cir. 1965); *Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*, 410 F.2d 1006, 1009 (D.C. Cir. 1969).

the conviction that the demeanor of a witness may belie his words, so that a judgment based on the words alone is likely to be wrong:

> [Demeanor] evidence may satisfy the tribunal, not only that the witness' testmony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.).

> Let us imagine that every spoken word in a trial is all correctly written out, and then all read by the jury, or read to the jury or the judge. Is there anyone so foolish as to say that a wrong decision would not be more likely in the absence of living witnesses and speakers . . .[?]

J. Frank, *Courts on Trial* 21 (1949), quoting Osborne, *The Mind of the Juror* 86-98 (1937).

The point was made perhaps most succinctly in an early decision of the Illinois Supreme Court: "There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness merely from reading the words spoken by him . . . ." *Calvert v. Carpenter*, 96 Ill. 63, 67 (1880).

The district judge, therefore, was in no position to make any meaningful assessment of the contested facts regarding Raddatz' motion – all of which depended on conflicting testimony – without hearing the witnesses. His judgment, required to be independent, was necessarily arbitrary. It could not comport with due process, an essential function of which "is to minimize the risk of

erroneous determination." *Addington v. Texas*, ___ U.S. ___, 99 S. Ct. 1804, 1809 (1979).

2. The factors analyzed in determining what process is due in administrative proceedings also dictate that the trier of fact in a motion to suppress involuntary statements must observe the witnesses testify.

The tradition of credibility determination by one who has heard the witnesses is of such "nearly complete and longstanding acceptance"[24] that this Court has not yet had occasion to define it as an element of due process in judicial proceedings.[25] Accordingly, the Government has suggested that the due process question here be analyzed under the principles which this Court set forth in determining the extent of due process rights to hearing in certain administrative cases. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mackey v. Montrym*, ___ U.S. ___, 99 S. Ct. 2612, 2617 (1979). These cases require a balancing of three factors: (1) the private interest affected by the governmental action sought to be reviewed; (2) the risk of erroneous deprivation of that private interest and the extent to which the risk will be reduced by the procedural safeguards proposed; and (3) the government's interest in the proceeding, including both its function and the costs of the proposed safeguard.

[24] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[25] Courts of appeal have made such due process rulings. *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 469 (2d Cir. 1972); *Smith v. Dental Products Co.*, 168 F.2d 516, 518–19 (7th Cir. 1948). And this Court has stressed the importance of observation of witnesses by the trier of fact in requiring production of witnesses under the Confrontation Clause of the Sixth Amendment. *Berger v. California*, 393 U.S. 314, 315 (1969). ("[O]ne of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses.") Finally, three justices of this Court, discussing an issue not reached by the majority, stated that factfinding by record review, in the context of a juvenile delinquency proceeding, violated due process. *Swisher v. Brady*, 438 U.S. 204, 231 (1978) (Marshall, J. dissenting).

This model for determining administrative process may not fit precisely the workings of courts of law, where a long-established practice has come to define the process due. Indeed, administrative procedure is frequently distinguished from the more deliberate judicial process. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940); 2 Davis, *Administrative Law Treatise* §11.01 (1958). However, even the factors considered by this Court in judging the constitutional adequacy of administrative process make it clear that rehearing of witnesses was required in this case.

a. **The private interest.** Raddatz' interest in the proceeding under review is his right, under the Fifth Amendment, not to be a witness against himself. He moved to suppress his statements to federal agents on the ground that the agents obtained these statements by promising him immunity from a criminal charge. That the right against self-incrimination is of fundamental importance is so well-known that little argument should be necessary. *See Ullman v. United States*, 350 U.S. 422, 426 (1956); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). Yet the Government attempts to belittle the right by asserting that what is involved here is merely the suppression of evidence, "concerned with deterrence of official misconduct and not with the more fundamental determination of guilt or innocence." (Gov. Brief at 45.) In so arguing, the Government confuses one issue, whether the exclusionary rule should be imposed by the courts to enforce the warrant and reasonable search requirements of the Fourth Amendment, with the very

different issue of enforcing the Fifth Amendment according to its terms.

The Fifth Amendment, in contrast to the Fourth, contains a "direct command against the admission of compelled testimony." *United States v. Janis*, 428 U.S. 433, 443 (1976). In adopting the prohibition against self-incrimination, the framers of the Bill of Rights "made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Ullman, supra*, 350 U.S. at 427, quoting *Maffie v. United States*, 209 F.2d 225, 227 (5th Cir. 1954). *See* L. Levy, *Origins of the Fifth Amendment* 432 (1968).

Moreover, and wholly apart from the constitutional basis of respondent's motion to suppress, its determination was of the greatest practical importance: it decided the outcome of the prosecution. The suppression hearing in this case was in fact "the only judicial proceeding of substantial importance" that occurred during the prosecution, and "the only one in which the important factual and legal issues in the prosecution were litigated." *Gannett Co., Inc. v. DePasquale*, ___ U.S. ___ , 99 S. Ct. 2898, 2933 (1979) (Blackmun, J., dissenting in part). This is not uncommon:

> In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case.

Gannett, supra, 99 S. Ct. at 2914 n.1 (Powell, J., concurring).

Thus, while guilt or innocence is not directly at issue in a suppression hearing, it is, in a case like this one, effectively determined. As the Court of Appeals properly stated, the individual's interest is a compelling one. *Cf. In re Winship*, 397 U.S. 358, 363 (1970).[26]

b. **Likelihood of error.** As shown above, Raddatz' interest in this case is a liberty interest under the Fifth Amendment in avoiding the admission of coerced self-incriminatory statements and in avoiding subsequent conviction based on those statements. The administrative due process decisions next direct inquiry into the likelihood of an erroneous decision under the procedures being challenged, resulting in a deprivation of this individual interest. In this case, the question is whether the district judge is likely to make an erroneous determination of credibility if he does not observe the witnesses testify.

As a vast body of precedent applicable to judicial proceedings has recognized (see pp. 44-47, *supra*), credibility cannot be determined accurately without consideration of demeanor evidence. Indeed, in deciding administrative

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[26]The Government argues (Gov. Brief at 46-48) that this Court has minimized the importance of the private interests at stake in suppression hearings, citing *Lego v. Twomey*, 404 U.S. 477 (1972); *United States v. Matlock*, 415 U.S. 164 (1974); and *McCray v. Illinois*, 386 U.S. 300 (1967). None of these decisions, however, deprecates the importance of the right against self-incrimination or the individual interest in avoiding criminal conviction. Rather, the decisions turn on the compelling interest of the Government in being able to introduce all competent evidence at a criminal trial. In the present case, the procedural protection sought – personal observation of witnesses by the district court – does not impair any interest of the Government in regard to criminal prosecution. This issue is discussed more fully at pp. 54-56, *infra*.

due process cases, this Court has insisted upon personal observation of witnesses by the trier of fact wherever credibility determinations are critical. In *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970), the Court struck down the procedures by which the City of New York terminated welfare benefits because they did not permit welfare recipients "to appear personally . . . before the official who finally determines continued eligibility." The Court explained, "Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." 397 U.S. at 269. In *Mathews v. Eldridge*, on the other hand, the Court declined to require an opportunity for personal observation of witnesses in cases of social security benefit termination, in large part because the issues in these cases turn upon medical evidence, in which "the specter of questionable credibility and veracity is not present." 424 U.S. at 344, quoting *Richardson v. Perales*, 402 U.S. 389, 407 (1971). *See also Califano v. Yamasaki*, ___ U.S. ___, 99 S. Ct. 2545, 2555 (1979). In the present case (see pp. 40-44, *supra*), and in motions to suppress incriminatory statements generally, credibility questions are often determinative. *Davis v. North Carolina*, 384 U.S. 737, 741 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961) (Frankfurter, J., announcing the judgment of the Court):

> Determination of [whether a confession is involuntary] requires assessments of the relative credibility of witnesses whose stories, in cases involving coercion, are frequently, if not almost invariably contradictory.[27]

[27] Justice Frankfurter's opinion in *Culombe* goes on to state that the ascertainment of credibility in such cases "belongs to the trier of facts before whom those witnesses actually appear." 367 U.S. at 603.

Indeed, in *Jackson v. Denno*, 378 U.S. 368, 391 (1964), this Court recognized that its own record review was "an inadequate substitute for a full and reliable determination of the voluntariness issue" in a motion to suppress. A district judge is no more able than this Court to make an adequate determination of a motion to suppress solely by reading a hearing transcript.

The Government does not appear to argue to the contrary. Instead, it primarily argues, in effect, that the accuracy of the district judge's decision on the facts is not important, that no injustice is done in any event if his findings accord with those of the magistrate, who did see the witnesses. (Gov. Brief at 43-45, 49-50.) This argument, however, renders wholly meaningless the statutory directive of de novo determination by the district judge, which, as conceded by the Government, requires the judge to make independent findings, without deference. If the judge is in fact to decide independently, he must have a basis for doing so. The judge must be able to conclude reasonably whether a magistrate's assessment of credibility was right or wrong. He can do so only by hearing the conflicting witnesses.[28]

[28] This is, in effect, the holding of *United States v. Bergera*, 512 F.2d 391, 392-394 (9th Cir. 1975). In this case, decided before the 1976 amendments to the Magistrates Act required de novo determination of contested factual issues, the court of appeals held that unless the district court relies on the factfinding of the magistrate (which it may no longer do), "it must itself hear the testimony and see the evidence before deciding the motion." 512 F.2d at 394.

The Government makes an additional argument (Gov. Brief at 51) that rehearing of witnesses by the district judge might itself produce inaccurate decisions because the witnesses will have had the opportunity to "rehearse" their testimony in the hearing before the magistrate. Such rehearsal hardly prevents effective cross-examination. *See Rouse v. United States*, 359 F.2d 1014, 1016

[footnote continued]

The Government also argues that administrative agencies routinely engage in *de novo* determinations of credibility on the basis of record review of hearings conducted by administrative law judges. (Gov. Brief at 51-53.) This is incorrect; administrative agencies, unlike the trial judge below, are entirely free to defer to the findings of those who heard the witnesses. None of the statutes or regulations cited by the Government requires an administrative agency to make a *de novo* determination of anything. The tradition of administrative law is entirely to the contrary:

> The agency is free to adopt the examiner's recommendation with as little attention to the case as it cares to give. An agency having full confidence in the integrity and ability of a particular examiner may readily accept his recommendations, and when this happens, the effective power may be largely transferred to the examiner.

K. Davis, *Administrative Law Text* §10.04 at 222 (1972 ed.)

Indeed, the courts have taken steps to assure that agencies have access to reliable credibility determinations in cases where credibility is important, by requiring that the administrative law judge who prepares proposed findings actually hear the witnesses. *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106, 113-115 (8th Cir. 1954); *Board of Pharmacy v. Feldman*, 279 F.2d 821 (D.C. Cir. 1960); *Van Teslaar v. Bender*, 365 F.Supp. 1007, 1012 (D. Md. 1973); *see* 2 K. Davis, *Administrative Law Treatise* §11.18 at 113 (1958).

(D.C. Cir. 1966) (police officer's change of testimony at trial provokes further doubt abut testimony at hearing on motion to suppress). Moreover, the Government's argument would call into question the value of demeanor evidence of witnesses who appeared at a preliminary hearing or a prior trial - all of whom are required to be "reheard" if available. *See Berger v. California*, 393 U.S. 314, 315 (1969).

Moreover, administrative agencies cannot ignore the findings of their hearing officers where credibility is critical. In these cases, where an agency has no demonstrable reason for not adopting the hearing officer's findings, the courts have repeatedly refused to enforce agency orders. *Bon-R Reproductions, Inc. v. NLRB*, 309 F.2d 898, 907 (2d Cir. 1962); *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972); *Loomis Courier Services, Inc. v. NLRB*, 595 F.2d 491, 495-96, 499 (9th Cir. 1979). The court in *Bon-R* noted:

> A determination of intent by demeanor evidence is a common occurrence in our trial courts. This being precisely the kind of issue as to which demeanor evidence is relevant, the examiner's finding should accordingly be given "special weight."

309 F.2d at 907. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-97 (1951). The administrative cases fully support the basic proposition that credibility cannot be accurately determined by a decisionmaker who has not viewed the witnesses.[29]

c. **The governmental interest.** The final factor to be weighed under the administrative due process decisions is

[29]This conclusion is not contradicted by the language in *Utica Mutual Insurance Co. v. Vincent*, 375 F.2d 129, 132 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967) that "the due process clause does not require under all circumstances that factual determinations be made by the person hearing the evidence." (quoting dicta from *United States v. Vater*, 259 F.2d 667, 673 (2d Cir. 1958)). *Utica Mutual* dealt with an NLRB determination of the proper unit for a representation election, an issue which the court held need not even be decided at an adjudicatory proceeding because the investigation was "essentially informal, not adversary." 375 F.2d at 129, 133, quoting *Inland Empire Dist. Council, etc. v. Millis*, 325 U.S.

[footnote continued]

the governmental interest at stake in the proceedings. In this case, the question is whether the Government's interest is sufficiently compelling to justify procedures which create a substantial risk of an erroneous decision on an issue of fundamental constitutional right. There are two distinct governmental interests involved here, neither of which justified the procedures employed below.

First, the Government has an interest, as prosecutor in a criminal case, in seeing that all properly obtained evidence is utilized. This interest is not impaired by requiring the district judge to view the witnesses. In the present case, a trial judge, on the basis of record review, resolved credibility questions in the Government's favor. In other cases, however, he will resolve such issues against the Government. Requiring observation of conflicting witnesses cannot, in the abstract, disadvantage either party. It is a neutral procedure, advancing both parties' interest in an accurate determination.

This case thus contrasts sharply with cases in which the Government's prosecutorial interests in a suppression hearing were at stake. In *Lego v. Twomey*, 404 U.S. 477 (1972), for example, the petitioner argued that the Government should bear the burden of proof beyond a reasonable doubt at a suppression hearing. Had this Court agreed, many statements voluntarily given to police

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133, quoting *Inland Empire Dist. Council, etc. v. Millis*, 325 U.S. 697, 706 (1945). *See* K. Davis, *Administrative Law Text* §7.03 at 161 and 161 n. 7 (1972). In *United States ex rel. Graham v. Mancusi*, 457 F.2d 463 (2d Cir. 1972), Judge Friendly, the author of *Utica Mutual*, noted that "cases emphasizing the importance of demeanor as an aid to the determination of credibility are too numerous and well-known to require extended citation," that such cases were rooted in due process, and that the rule of *Utica Mutual* was simply a "qualification . . . recognized for certain civil and administrative proceedings." 457 F.2d at 469.

would have been excluded because the trier of fact had a reasonable doubt about their voluntariness. This would have seriously impaired the prosecution's interest "in placing probative evidence before juries." 404 U.S. at 489. Moreover, it would not have ensured that suppression decisions were more accurate, only that the risk of inaccuracy was disproportionately borne by the Government. The Court's decision not to require proof beyond a reasonable doubt was responsive to the Government's compelling interest.

Similarly, in *Brinegar v. United States*, 338 U.S. 160 (1949), *McCray v. Illinois*, 386 U.S. 300 (1967) and *United States v. Matlock*, 415 U.S. 164 (1974), where this Court approved of evidentiary practices in Fourth Amendment suppression hearings less rigid than those ordinarily employed at trial, contrary rulings would have impaired the Government's ability to prove that a particular arrest or search was proper, thus excluding probative evidence at trial or terminating the prosecution. In each case, the Court ruled that there was ample basis in the record for establishing the reliability of the evidence in question.[30]

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[30] *Brinegar* allowed the trial judge in hearing a motion to suppress to consider evidence which might have been inadmissible in a jury trial. The reliability of the evidence (testimony concerning a prior arrest) was not in dispute. 338 U.S. at 173. *McCray* allowed police officers to testify concerning the information they received from an informant without disclosing his identity. The officers testified personally, however, and were subject to cross-examination; it was their credibility that was at issue in the hearing. 386 U.S. at 313. *Matlock* allowed introduction of hearsay statements by a woman who lived with the defendant. The woman testified on the defendant's behalf and so was available for questioning on the matter; moreover, the statements she gave were against her penal interest. 415 U.S. at 175-177.

Moreover, the Court stressed in each case that the evidentiary decisions would be made by the judge who decided the motion to suppress. 338 U.S. at 172-173 (judge able to consider prejudicial evidence for limited purpose); 386 U.S. at 313 ("The judge was obviously satisfied that each [police officer] was telling the truth, and for that reason he exercised [his] discretion . . . to respect the informer's privilege."); 415 U.S. at 175 ("There is . . . much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence . . . [he] should receive the evidence and give it such weight as his judgment and experience counsel.") Thus, even in cases which involved the Government's interest in effective prosecution, the Court did not sanction inaccuracy in factfinding, and surely did not intimate approval of a procedure which would remove the judge from a position in which he can make personal determinations of witness credibility. In the present case, where the Government's prosecutorial interest is not impaired, there is much less reason to allow such a procedure.

The second governmental interest involved in this case is efficiency in judicial administration. The Government argues that rehearing of witnesses by the district court should never be required because "[t]he consequent cost in terms of increased court congestion is simply too high a price to pay for the minimal benefits, if any, that would be derived from a two-hearing requirement." (Gov. Brief at 56-57.)

The Government's argument is mistaken, first, in characterizing as minimal the "benefit" of rehearing witnesses on disputed questions of fact where credibility is determinative. This procedure is, to the contrary, essential for any accurate determination by the district judge, whom both the Magistrates Act and Article III require to decide

suppression motions independent of a magistrate's recommendation. Of course, a rehearing imposes additional expense, but when a fundamental right like that against self-incrimination is at stake, concerns of economy cannot be determinative. *Bloom v. Illinois,* 391 U.S. 194, 209 (1968) (right to jury trial for serious criminal contempt enforced despite sacrifice of "efficiency, expedition, and economy"); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972) (requiring hearing to determine unwed father's right to custody because "the Constitution recognizes higher values than speed and efficiency"). The point was forcefully stated by Justice Black in *Reid v. Covert,* 354 U.S. 1, 14 (1957):

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

In addition, the Government errs in its assessment of the extent of the burden which would actually be imposed by the requirement of rehearing conflicting witnesses in cases like the present one.

First, hearings on motions to suppress assume only a small portion of the time of district judges. While there appears to be no definitive estimate of the time spent by district judges in hearing suppression motions, a recent two-month study by the General Accounting Office determined that suppression motions were filed in only 16% of all criminal cases, and that fewer than one quarter of these were motions to suppress confessions. *Impact of the Exclusionary Rule on Federal Prosecutions,* Report by the Comptroller General of the United States 1 (April

19, 1979). The study also indicated that the resources expended for hearings on Fourth Amendment suppression motions (the only motions examined in this respect) "were modest when compared with the total resources used in the criminal justice system." *Id.* at 1-2.

Second, magistrates themselves appear to be expending relatively little time in the type of hearing involved in the present case. During the twelve-month period ending on June 30, 1979, magistrates throughout the United States conducted only 560 evidentiary hearings in criminal cases. *1979 Annual Report of the Director of the Administrative Office of the United States Courts* A-150 and A-151 (Table M-5). This compares to magistrates' disposition of 69,798 matters pursuant to 28 U.S.C. §636 (a), including issuance of warrants, preliminary examinations, and bail proceedings (*id.* at A-142 and A-143, Table M-3); to their disposition, without hearings, of 40,131 criminal matters and 78,917 civil matters pursuant to 28 U.S.C. § 636 (b), including 1,604 case-dispositive and 9,581 non-dispositive motions in criminal cases (*id.* at A-144 through A-149, Table M-4); and to their disposition of 100,267 minor and petty offenses. (*id.* at A-134, Table M-1.)

Third, of the relatively few (560) hearings which magistrates have conducted in criminal cases, many would not require rehearing by a district judge because they were not case-dispositive, because they did not involve critical issues of credibility, or because the magistrate's findings which resulted from them were not challenged by any party.

Fourth, even under the Government's view, judges may decide in their discretion to rehear the testimony of witnesses whose credibility is in issue when that testimony is critical to the determination of a case-dispositive matter.

The savings posited by the Government occur only when judges choose not to do so.

Fifth, and finally, even a process of "thorough" record review, advocated by the Government, is time-consuming. The district judge must not only read the transcript, he must ponder the competing testimony in an attempt to determine which is more credible. Unless the judge simply signs the magistrate's recommended order, he must involve himself in an effort of considerable difficulty and magnitude.[31]

Undoubtedly there would be some saving of the resources of the judiciary if district judges were allowed to decide case-dispositive motions to suppress involuntary statements, where credibility is crucial, merely by reading a transcript of a hearing. But this saving would be, from all objective indications, both speculative and small. It hardly provides the basis for injecting arbitrariness into decisions on fundamental constitutional issues.[32]

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[31] After passage of the 1976 amendments to the Magistrates Act, which are in issue in this case, Congress continued its hearings on the most effective means of employing magistrates. At these hearings, several witnesses urged Congress not to require district judges to hear appeals from civil cases tried by magistrates, noting that it is more efficient for district judges to try cases themselves than to act in an appellate capacity. *See Magistrates Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcommittee on Improvements in Judicial Machinery of the House Committee on the Judiciary,* 95th Cong., 1st Sess. (1977) at 93 (remarks of Hon. Otto R. Skopil, Jr.); 121 (remarks of Robert Acomb, Esq.); 115-116 (remarks of Hon. Morey Sear).

[32] Much greater savings can be expected under the 1979 amendments authorizing magistrates to conduct civil trials with the consent of the parties. Experience with consensual references under the 1976 amendments has been successful in many districts. *See, e.g., The Federal Magistrates Act of 1979, S. 237: Hearing Before the Subcomm. on Improvements in Judicial Machinery of*

[footnote continued]

III.

RADDATZ WAS CONSTITUTIONALLY ENTITLED TO A MEANINGFUL DETERMINATION OF HIS MOTION TO SUPPRESS BY AN ARTICLE III JUDGE.

As discussed in Section I above, the Magistrates Act expressly required the district judge in this case to make a de novo determination of the contested issues in the magistrate's report. If that statutory directive is interpreted according to its terms, requiring the judge to make a meaningful independent determination, this case raises no issue under Article III of the Constitution.

The Government, however, engages in a lengthy argument to the effect that Congress has unrestricted power to divest the lower federal courts of all their judicial power and vest it instead in state courts and legislative tribunals. (Gov. Brief at 30-37.) From this basis, the Government argues that Raddatz had no constitutional right to an Article III determination of his motion, implying that the de novo determination requirement of the Magistrates Act is of little importance.

The Government's argument is thoroughly mistaken. Congress' power to vest jurisdiction in state courts does

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the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 17 (1979) (Statement of Hon. Otto R. Skopil); *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 28 (1977) (Statement of Peter McCabe.) Moreover, requiring the parties' consent before the magistrate can try a civil case, among other things, serves to meet the problem of the "unevenness in the ability of magistrates to perform their tasks." *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before The Subcomm. on Courts, Civil Liberties, and The Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 27 (1977) (Statement of Hon. Griffin B. Bell).

not give it power to vest jurisdiction in non-Article III federal courts, and Congress has no authority under Article I of the Constitution to establish legislative tribunals with general jurisdiction to decide criminal or constitutional questions. Congress has in fact chosen to have the federal judiciary decide federal criminal cases. 18 U.S.C. §3231. Having made that choice, Congress could not allow dispositive matters to be decided by any but Article III judges. The requirement of an independent de novo determination in section 636 (b) (1) (C) of the Magistrates Act is of constitutional importance.

A. The Power Of Congress To Grant To State Courts Jurisdiction Over Federal Criminal Cases Does Not Establish Any Power To Vest Jurisdiction In Non-Article III Judicial Officers.

The Government argues that because Congress has the power to dismantle the system of inferior federal courts and require state courts, not constituted in accordance with Article III, to enforce federal criminal statutes, Congress could provide for the determination of federal criminal matters by non-Article III federal officers. (Gov. Brief at 33.) This contention is unfounded. As the Government recognizes, the permissive and flexible nature of Congress' Article III power to constitute inferior federal courts reflects a fundamental policy decision by the framers of the Constitution concerning the allocation of state and federal power in the federal system. (Gov. Brief at 30.) The purpose of making congressional power under Article III permissive rather than mandatory was to permit Congress to preserve a wider field for state judicial power, not to permit it to expand federal judicial power in a manner inconsistent with Article III. *See* 2 Farrand, *The Records of the Federal Convention of 1787* 45-46 (1911); P. Bator, *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System* 11-12 (1973). As this

Court has stated, the fact that state courts may adjudicate federal issues is no argument for the proposition that sitting federal courts can abdicate their responsibility to adjudicate federal issues, particularly federal constitutional issues, which come before them. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). Moreover, the vesting of federal criminal jurisdiction in the state courts poses no threat to the constitutional scheme of separation of powers within the federal government, one of the framers' chief concerns in providing for the complete independence of the judicial branch. *See The Federalist*, No. 78 at 465-466 (Hamilton) (Rossiter ed. 1961).

This case has nothing to do with Congress' power to apportion judicial authority between state and federal courts. Rather, it involves the *federal* exercise of the judicial power of the United States in an Article III trial court, to which Article III clearly applies.

B. Congress Has No Authority To Create Article I Tribunals With General Jurisdiction To Decide Criminal Or Constitutional Issues.

Contrary to the Government's assertion, the Constitution does not empower Congress to create an Article I tribunal with general jurisdiction to decide criminal cases or constitutional questions. Congress may establish legislative courts only in the execution of one of its specific legislative powers. *See, e.g., American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (the jurisdiction of the territorial courts "is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States"); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (customs courts are established pursuant to Congress' power to lay and collect

duties on imports, Art. I, §8, cl. 1);[33] *Williams v. United States*, 289 U.S. 553 (1933) (courts of claims are established pursuant to Congress' power to pay the debts of the United States, Art. I, §8, cl. 1); *Crowell v. Benson*, 285 U.S. 22, 56-64 (1932) (administrative tribunal may decide longshoreman's injury claim pursuant to the admiralty power of Congress);[34] *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943) (the Interstate Commerce Commission, established pursuant to Article I, §8, cl. 3, has authority to conduct railroad reorganization proceedings);[35] *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918) (local draft boards have power to classify individuals for the selective service, established pursuant to Congress' authority over the military, Art. I, §8, cl. 11-16).[36]

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[33] Customs courts were subsequently established as Article III courts. *See Glidden v. Zdanok*, 370 U.S. 530, 584 (1962). The Court of Claims had a similar history. *See Williams v. United States*, 289 U.S. 553, 578-581 (1933); *Glidden, supra* at 584.

[34] For a discussion of the implication of legislative power over the subject of admiralty from history, the necessary and proper clause, and the constitutional grant of judicial power respecting "all Cases of admiralty and maritime Jurisdiction," Art. III, §2, *see Detroit Trust Co., v. The Thomas Barlum*, 293 U.S. 21, 42-44 (1934); Gilmore & Black, *The Law of Admiralty* 694 (2d ed. 1975).

[35] The Government contends that in conducting reorganizations, the Article I Commerce Commission is exercising an inherently judicial Article III power over bankruptcies. (Gov. Brief at 32.) However, congressional power under Article I, §8, cl. 4, to make uniform laws on bankruptcies, "and not the judicial power under Art. III, is the source of our system of reorganizations and bankruptcy." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 594 (1949) (plurality opinion of Jackson, J.).

[36] The Government argues from *Selective Draft Law Cases* that a criminal prosecution in an Article III court can be based in part on factual determinations made by an Article I tribunal, a proposition which the Government itself concedes has been accepted by

[footnote continued]

Similarly, it is the power "[t]o exercise exclusive Legislation in all Cases whatsoever" in the District of Columbia, Art. I, §8, cl. 17, that authorizes Congress to establish non-Article III courts to resolve cases, including criminal cases, involving laws applicable only to the District of Columbia. *Palmore v. United States*, 411 U.S. 389, 397-398 (1973); *see also Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 468 (1930); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-444 (1923). Hence, this Court's statement that "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts," *Swain v. Pressley*, 430 U.S. 372, 382-383 (1977); *Palmore, supra*, 411 U.S. at 407, is not "applicable where laws of national applicability and affairs of national concern are at stake." *Palmore, supra*, 411 U.S. at 407-408.[37] Both *Swain and Palmore* involved District of Columbia statutes of strictly local applicability. *See Key v. Doyle*, 434 U.S. 59, 61-68 (1977) (a law applicable only in the District of Columbia is not a "statute of the United States" for purposes of 28

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the courts rarely and with caution. *See Estep v. United States*, 327 U.S. 114, 122-123 (1946), discussed by the Government at 36, and Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1381-1382 (1953). In any event, a case that stands for the proposition that Congress can establish an Article I tribunal in an area over which it has specific legislative power, such as the military, subject to limited review by an Article III court, does not support the Government's argument that Congress, where it has no such power, could establish a legislative court to exercise the general criminal and constitutional adjudicatory power of the United States.

[37]The requirements of Article III give way only in "proper circumstances . . . to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore, supra*, 411 U.S. at 408.

U.S.C. §1257 (1)). Raddatz was prosecuted under a law of national applicability, and his motion to suppress alleged that agents of the United States Government violated his Fifth Amendment rights.

The Government specifies only one source of congressional authority to establish a legislative tribunal for criminal or constitutional matters – the power conferred by Article I, §8, cl. 9, "[t]o constitute tribunals inferior to the Supreme Court." (Gov. Brief at 35.) This Court, however has clearly denied that legislative courts are authorized by this clause. *See Glidden v. Zdanok*, 370 U.S. 530, 543 (1962): "The power given Congress in Article I, §8, cl. 9, 'To constitute Tribunals inferior to the supreme Court,' plainly refers to the 'inferior courts' provided for in Art. III, §1; it has never been relied on for establishment of any other tribunals."

Moreover, when Congress is exercising a specific legislative power, its power to supplant independent Article III courts with legislative tribunals is limited by the strictures of Article III and the special role of the independent judiciary under the Constitution. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-16 (1955); *Reid v. Covert*, 354 U.S. 1, 21-22, 44, 70 (1957); *see generally* Note, *The Validity of United States Magistrates Criminal Jurisdiction*, 60 Va. L. Rev. 697, 715 (1974); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023, 1031-1032 (1979).

In sum, Congress has no authority to vest the power to decide a motion to suppress involuntary statements in an Article I forum.

C. Because Jurisdiction Over This Case Was Vested In An Article III Federal District Court, Raddatz Was Entitled To The Constitutional Safeguards Of That Forum.

As shown above, the Government's arguments regarding Congressional power are mistaken. These arguments, moreover, have the effect of diverting attention from the critical constitutional consequences that flow from the fact that the Congress – regardless of whether it was compelled to do so – has in fact vested jurisdiction over the matters involved here in an Article III court. 18 U.S.C. §3231; 28 U.S.C. §636 (b) (1) (B).

The vesting of jurisdiction in a particular forum to a large extent determines the procedural rights that apply. *See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 460-461 (1977); *Curtis v. Loether*, 415 U.S. 189, 195 (1974). The decision of Congress to vest jurisdiction over this case in an Article III court entitled Raddatz to the special constitutional attributes of that forum including the exercise of judicial power by a judge whose independence is ensured by lifetime tenure and a salary which cannot be diminished. U.S. Const. Art. III, §1; *see Glidden v. Zdanok*, 370 U.S. 530, 533, 536 (1962); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

Magistrates are not Article III judges. They are appointed by the judges of the district court for eight-year terms, in numbers and at locations established by the Judicial Conference. 28 U.S.C. §631 (a), (e). They can be removed by a majority of the judges of a district for such vague causes as "incompetency, misconduct, neglect of duty, or physical or mental disability." A magistrate's office can be terminated if the Judicial Conference "determines that the services performed by his office are

no longer needed." 28 U.S.C. §631 (h), *as amended*, §631 (i) (1979). Magistrates' rate of compensation may be raised or lowered at any time during a term provided it is not lowered below the salary fixed at the beginning of the term, and it is subject to diminution between terms. 28 U.S.C. §634 (b). These tenure and salary provisions, being statutory rather than constitutional, are not protected from legislative abridgment. *See Glidden v. Zdanok, supra*, 370 U.S. at 534. Hence, magistrates are dependent, to varying degrees, on the judges of their district, the Judicial Conference and Congress for their tenure and their livelihood.

The tenure and salary provisions of Article III serve two distinct purposes. First, they are intended to insure "the complete separation of the judicial from the legislative power." *The Federalist*, No. 79 at 472 (Rossiter ed. 1961); *see The Federalist*, No. 78 at 465-466; *O:Donoghue v. United States*, 289 U.S. 516, 530 (1933), quoting 1 Andrews, *The Works of James Wilson* 367 (1896). The tenure and salary protections of Article III are so important in the constitutional plan of separation of powers that this Court has held statutory grants of lifetime tenure and salary insufficient to satisfy Article III because statutes are subject to change at the will of Congress. *Glidden v. Zdanok, supra*, 370 U.S. at 534. Second, the tenure and salary provisions, and the judicial independence secured thereby, are "basic constitutional protections designed in part for the benefit of litigants." *Glidden v. Zdanok, supra*, 370 U.S. at 536; *see The Federalist, supra*, No. 78 at 466, 471.

While district courts have the power in civil cases to employ the assistance of such non-Article III personnel as auditors or masters, the permissible scope of such refer-

ences has been carefully circumscribed. *See LaBuy v. Howes Leather Co.*, 352 U.S. 249, 257-259 (1957).[38]

Article III was intended to establish a judiciary of uncommon talent, independence and character, in part because of its special responsibility for the determination of constitutional controversies. Rejecting the limited tenure provisions of contemporary state constitutions, Hamilton observed that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution" where courts would be called upon to judge the compliance of coordinate brances of government with the Constitution. *The Federalist*, No. 78, *supra* at 466. He said:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

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[38]The policy of the Constitution that the federal judicial power should be exercised only by judges protected by Article III safeguards is the underlying source of the restriction on the power of federal district court judges to make references to masters. As Judge Kaufman has written:

> The Chief factor militating against unrestricted references in the federal courts is the possibility that it may result in an abdication of the judicial function, exclusively reserved by the Constitution to the federal judiciary.

Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 453 (1958). The critical issue in determining the propriety of a reference is "the nature of the duties to be conferred by the reference." *Id.* at 457. Reference of matters involving the assessment of the credibility of witnesses is generally viewed as improper. *Id.* at 453 n.6. Matters such as accountings which require "no particular judicial talent or insight" can appropriately be referred. *Id.* at 457. In *LaBuy*, *supra*, the Court approved the use of a master to prepare an accounting "provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation." 352 U.S. at 259.

Id. at 470-471.

Of all the matters that come before federal judges, few involve them as immediately in the role of vindicating federal rights as motions to suppress confessions under the Fifth Amendment. Resolution of these motions requires experience, sophistication, and an understanding of the meaning and purpose of constitutional guarantees so that they can be properly applied in the extraordinarily varied factual circumstances motions to suppress present. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *Haley v. Ohio*, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring). These motions must often be decided amid inflamed and hostile public feeling where an independent judiciary has a special function to serve. *See Chambers v. Florida*, 309 U.S. 227 (1940); *Nardone v. United States*, 308 U.S. 338, 342 (1939); *McNabb v. United States*, 318 U.S. 332, 346-347 (1943); *The Federalist*, *supra*, No. 78 at 469.

When James Madison proposed the adoption of the first ten amendments to the first Congress in 1789, he was confronted with the argument that these guarantees would be unenforceable and hence useless. In response, Madison stated:

> If [the protections of the Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Brant, *The Madison Heritage* and Black, *The Bill of Rights and the Federal Government*, quoting 1 Annals of Congress 439 (1834), in *The Great Rights* 36, 62 (E. Cahn ed. 1963).

In affording Raddatz an express statutory right to a de novo determination of his suppression motion by an Article III judge, Congress has respected the values which inform Article III. In light of that clear statutory directive and the importance of the Article III interests which would be compromised if the statute is not enforced according to its terms, the requirement of a de novo determination cannot be trivialized. The Magistrates Act should be construed to afford a meaningful de novo determination of contested issues and hence, a rehearing before the district court in the circumstances of this case. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *United States v. Johnson*, 323 U.S. 273, 275 (1944).

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

JOAN B. GOTTSCHALL
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Court-appointed Attorney for Respondent

Of Counsel:

EUGENE R. WEDOFF
DAVID J. BRADFORD
BARRY LEVENSTAM
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

TERENCE F. MACCARTHY
FEDERAL DEFENDER PROGRAM
219 South Dearborn Street
Chicago, Illinois 60604

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No. 79-8

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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UNITED STATES OF AMERICA, PETITIONER

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REPLY BRIEF FOR THE UNITED STATES

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1. For the first time in this litigation, respondent contends (Br. 20-35) that the proceedings in the district court concerning his suppression motion did not comply with the Federal Magistrates Act, 28 U.S.C. 636(b). Respondent recognizes that the Act specifically authorizes a magistrate to conduct a hearing and to make proposed findings of fact and recommendations of law with regard to a "motion * * * to suppress evidence in a criminal case * * *." 28 U.S.C. 636(b)(1)(A) and (B). He nonetheless argues that the district court's duty to make a "de novo determination * * * of the * * * [magistrate's] proposed findings and recommendations" (28 U.S.C. 636(b)(1)(C)) requires the district judge to rehear testimony previously adduced before the magistrate. Although respondent acknowledges that "the term 'de novo determination' does not necessarily require

a rehearing of evidence [in every case]" (Br. 22),[1] he suggests that such a duplication of efforts is required in any case in which there is a conflict in testimony among the witnesses. See Br. 23. This claim is squarely refuted by the language, legislative history and purpose of the Act.[2]

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[1]In light of this concession, respondent's initial discussion of the statutory question (Br. 20-22) is somewhat puzzling. He there appears to suggest that a rehearing is required in every case because "[t]he term 'de novo' has a common and accepted legal meaning" (*id.* at 21). In any event, the cases relied on by respondent involve different statutes with different purposes and histories and are thus inapposite.

For example, in *Agosto* v. *INS*, 436 U.S. 748 (1978), the Court concluded that a "hearing de novo" under Section 106(a)(5)(B) of the Immigration and Naturalization Act, 8 U.S.C. 1105a(a)(5)(B), entailed an evidentiary rehearing in the district court. There is an obvious difference in language between Section 106(a)(5)(B) and the Magistrates Act. In addition, the Court noted in *Agosto* that in enacting Section 106(a)(5)(B), "Congress was aware of our past decisions holding that the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings." 436 U.S. at 753. Here, in contrast, the legislative history accompanying the Magistrates Act demonstrates that "[t]he use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). See also *United States* v. *First City National Bank*, 386 U.S. 361, 368 (1967) ("review de novo" construed to mean trial de novo in light of language and legislative history of Bank Merger Act).

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[2]We note that Amicus Chicago Council of Lawyers, which otherwise supports respondent, nonetheless appears to accept that the Act "permits the district judge to assign to a magistrate the evidentiary hearing on a motion to suppress, and to refuse the defendant's request to hold a de novo hearing even when the magistrate's recommended decision depended on the credibility of witnesses" (Br. 4).

Section 636(b)(1)(C) provides that the district court "shall make a de novo determination of the [magistrate's] report" and thereby "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." It is thus apparent that Congress intended the district court to make a thorough evaluation of the magistrate's report and not to hold a de novo hearing of the evidence already heard and evaluated by the magistrate. Indeed, the statute further states that the district court "may also receive further evidence"—a grant of power wholly unnecessary if respondent's construction of "de novo determination" were correct. In sum, "[t]he Magistrates Act * * * [does not] require the district court judge to personally hear the evidence on a motion that has been referred to a magistrate" (Pet. App. 11a). Accord, *Banks* v. *United States*, No. 79-5099 (6th Cir. Jan. 30, 1980), slip op. 4-5; *United States* v. *Marshall*, No. 78-5664 (5th Cir. Jan. 2, 1980), slip op. 2084-2086; *United States* v. *Miller*, 609 F. 2d 336, 339-340 (8th Cir. 1979); *United States* v. *Edwards*, 602 F. 2d 458, 466-467 & n.7 (1st Cir. 1979); *Orand* v. *United States*, 602 F. 2d 207, 208-209 (9th Cir. 1979); *United States* v. *Whitmire*, 595 F. 2d 1303, 1305-1306 & n. 1 (5th Cir. 1979), petition for cert. pending, No. 79-375. Compare 28 U.S.C. 636(d) (district court must "hear the evidence" previously heard by magistrate in contempt proceeding).

Moreover, as we pointed out in our opening brief (pages 26-28), the legislative history unequivocally demonstrates that a "de novo determination" is not a "de novo hearing." Respondent primarily relies (Br. 29-30) on a prepared statement of the Judicial Conference that was placed in the record of a 1975 Senate hearing without congressional comment. See *Jurisdiction of*

United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 33-41 (1975).[3] That statement concerned an early version of the 1976 amendment to the Act that required the district courts to "hear de novo" dispositive motions. *Id.* at 33. It is therefore not surprising that the Judicial Conference's explanation indicates that the district judge would be required to conduct a second evidentiary hearing in some circumstances, even though the magistrate had already heard and evaluated the same testimony. *Id.* at 37.

The Judicial Conference's version of the Act was never enacted, however. Instead, Congress purposefully substituted the "de novo determination" requirement that now appears in the statute for the phrase "hear de novo," thereby explicitly rejecting respondent's construction of the Act. See H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 1 (1976). The legislative history further shows that the phrase "de novo determination" is derived from the Ninth Circuit's decision in *Campbell* v. *United States District Court for the Northern District of California*, 501 F. 2d 196, 206-207 (9th Cir.), cert. denied, 419 U.S. 879 (1974). See H.R. Rep. No. 94-1609, *supra*, at 3-4, 6. In that case, the court of appeals explained that the district court is required to make a "de novo determination" of a suppression motion referred to a magistrate, but "is not required to hear any witness and not required to hold a de novo hearing of the case." 501 F. 2d at 206-207.[4] The House Report accompanying the 1976

[3]The other legislative statements cited by respondent (Br. 30-31) reflect only that the district court has the power to rehear the live testimony if it so chooses.

[4]*Campbell* involved a construction of the original Act.

amendment to the Act quotes from *Campbell* with approval (H.R. Rep. No. 94-1609, *supra*, at 3-4) and emphasizes that "use of the words 'de novo determination' is not intended to require the judge to actually conduct a new hearing on contested issues." *Id.* at 3. See also *id.* at 11; 122 Cong. Rec. 35182-35183 (1976) (remarks of Rep. Railsback).[5]

Furthermore, respondent's construction of Section 636(b)(1)(C) would undermine the clear congressional purpose that informs the Act. Congress created federal magistrates to offset the growing crush of litigation in the district courts. See, *e.g.*, *Mathews* v. *Weber*, 423 U.S. 261, 266-269 (1976); *Wingo* v. *Wedding*, 418 U.S. 461, 463 (1974); S. Rep. No. 371, 90th Cong., 1st Sess. 8-12 (1967). In 1976 and again in 1979, Congress increased the jurisdiction of magistrates "in order to assist the judges of these courts in handling an ever-increasing caseload." H.R. Rep. No. 94-1609, *supra*, at 4. See, *e.g.*, S. Rep. No. 94-625, 94th Cong., 2d Sess. 2-6 (1976); H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 2-5, 19-20 (1979); S. Rep. No. 96-74, 96th Cong., 1st Sess. 1-3 (1979). In particular, Congress sought to delegate pretrial hearings in both civil and criminal cases to magistrates "as a means of freeing time of district court judges to preside at trials of other cases." H.R. Rep. No. 94-1609, *supra*, at 4. Respondent, however, would require the district judge to conduct a second hearing in every case in

[5]As we observed in our opening brief (pages 27-28), Congress has subsequently reiterated its view that "the words 'de novo determination' in subparagraph 636(b)(1)(C) do *not* require the judge to actually conduct a new hearing on contested issues." *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 37 (1977); see S. Rep. No. 96-74, 96th Cong., 1st Sess. 4 (1979); *Hearings on Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 167, 257 (1977).

which there is a conflict in testimony, thereby expending the court's resources and the time and energy of lawyers and witnesses. Because many, if not most, pretrial hearings and certainly most suppression hearings involve controverted testimony, the two-hearing requirement proposed by respondent is completely at odds with Congress' express goals.[6]

To be sure, the Act permits the district court to rehear the testimony previously presented before the magistrate. But, as the court of appeals concluded (Pet. App. 13a-14a), the district court did not abuse its broad discretion in not conducting a second, duplicative hearing in this case. The legislative history and purpose discussed above and in our opening brief shows that Congress intended that the district courts would make de novo determinations of substantive motions involving contested issues of fact without personally rehearing the evidence already evaluated by the magistrate. Moreover, in making a de novo determination in this case, the district court was able to rely on various objective factors in the record as well as the magistrate's credibility findings. First, respondent, who has a lengthy criminal record, contended at the hearing that he made no statements at all at the time of his arrest and that the police had threatened to kill him (Tr. 127, 150-153). Respondent adhered to this story despite his counsel's efforts to make him recall his statements or modify his testimony (Tr. 123-130, 149-153), despite the contrary testimony of the arresting officer as corroborated by the contemporaneous police report (*id.* at 4, 14-23, 26-29, 31-32, 153), and

[6]In fact, as a practical matter, a district judge would probably not use a magistrate for any pretrial hearing in which there is likely to be a difference in the witnesses' testimony if he must then rehear that testimony.

despite the fact that the statement made at the time of his arrest is consistent with the January 12 statement that respondent admits making.[7] In addition, respondent admitted at the hearing that he had lied to the agents in November 1976 (Tr. 110, 147). Finally, both federal agents unequivocally denied respondent's claim that he had been promised immunity if he would cooperate (Pet. App. 6a, 41a; A.16-17; Tr. 161, 184-185, 234-236).[8]

[7]The testimony of respondent's girlfriend was equally incredible. She claimed that the agents had offered respondent a lifetime job (Tr. 54, 85-86). Notwithstanding her admissions that she was not present during large parts of the conversations between the agents and respondent and that much of what she was stating was based on her conversations with respondent, she also claimed that she had not discussed the case with respondent and that she had decided on her own to testify (*id.* at 74-81, 88, 91-93, 95-96).

[8]Respondent argues at length (Br. 10-15, 39-42) that the agents' testimony was "in conflict on a number of critical issues." The agents consistently agreed, however, on the only relevant issue in the case: whether they had promised respondent immunity. Furthermore, notwithstanding respondent's claims to the contrary, the agents' testimony is not inconsistent even with regard to the immaterial issues on which respondent focuses.

Thus, respondent suggests (Br. 39) that Agent Russell denied that respondent was an object of the investigation on November 19, whereas Agent McCulloch testified that he was. The transcript pages cited by respondent, however, do not support his characterization of Agent Russell's testimony. Agent Russell stated only that he did not think that respondent had violated 18 U.S.C. 922(h) when he interviewed him on November 19, because respondent claimed that he had taken the gun from Batson in self-defense (Tr. 175-178). Similarly, Agent Russell denied that he specifically told respondent on November 19 that he might be indicted, not that he did not consider respondent to be a subject of the investigation (*id.* at 183-184).

Moreover, respondent erroneously contends (Br. 40) that Agent Russell claimed never to have discussed the question of cooperation with respondent at all, when in fact Agent Russell merely stated that he never talked with respondent about cooperation during the

2. Respondent's constitutional claims are addressed extensively in our opening brief (pages 28-58). We here reply briefly to respondent's analysis of the questions.

a. Respondent's discussion of due process (Br. 42-59) simply ignores the fact that respondent had a full and fair hearing before the magistrate. See *Jackson* v. *Denno*, 378 U.S. 368 (1964). Based on his view of the evidence and the demeanor of the witnesses, the magistrate concluded that the ATF agents were more credible than respondent, and he recommended that the suppression motion be denied (Pet. App. 41a). Had the district court merely deferred to those proposed findings and recommendations at that point and again denied respondent's motion, there is no question that respondent would have received all the process that he is due. That the district court instead thoroughly reviewed the record, including the magistrate's report, the transcript, and the parties' submissions, and then made a de novo determination of respondent's motion cannot possibly have deprived respondent of due process. See, *e.g.*, *Wingo* v. *Wedding*, *supra*, 418 U.S. at 486-487 (Burger,

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period between the November 19 and January 12 meetings (Tr. 161). (Respondent had intimated that he had made phone calls to the agents in that period of time (*id.* at 116, 147, 165, 207).)

The record also does not support respondent's claim that the agent's testimony differed as to the type of cooperation discussed with respondent on November 19. Read in context, it is apparent that Agent McCulloch's testimony about asking respondent to act as an informant referred to the January 12 and 14 meetings and not the meeting of November 19 (Tr. 235-238). Indeed, both agents agreed that the only discussion of cooperation on November 19 concerned their desire to have his aid in tracing the firearm that was in respondent's possession at the time of his arrest, since that firearm belonged to a man who had been murdered (*id.* at 165, 236).

C.J., dissenting); *Mildner* v. *Gulotta*, 405 F. Supp. 182, 195 (E.D.N.Y. 1975) (three-judge court), aff'd mem., 425 U.S. 901 (1976).[9]

b. Respondent also erroneously contends (Br. 47-49) that his cognizable interest in the outcome of the suppression motion is equivalent to the interests implicated at the criminal trial itself. Concomitantly, he argues that the process due at a Fifth Amendment voluntariness hearing is somehow greater than the procedural protections required at a Fourth Amendment suppression hearing. But in *Lego* v. *Twomey*, 404 U.S. 477 (1972), the Court made clear that a voluntariness hearing is concerned with "the method used to extract [confessions]" and is "designed to safeguard the right of an individual, *entirely apart from his guilt or innocence*, not to be compelled to condemn himself by his own utterances." *Id.* at 485 (emphasis supplied). In short, "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability

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[9]Respondent does not cite or discuss the Court's summary affirmance in *Mildner* v. *Gulotta*, *supra*. In that case, plaintiffs challenged New York's disbarment procedures on due process grounds. The Appellate Division of the New York Supreme Court is responsible for disciplining and disbarring attorneys charged with misconduct. The appellate court does not conduct the evidentiary hearings, however. Instead, it assigns the case to a referee for a formal disciplinary inquiry at which evidence is presented and witnesses testify. The referee, like a magistrate, evaluates the evidence and the demeanor of the witnesses and then submits a report to the Appellate Division. The referee has no power to determine, and the Appellate Division is free to substitute its judgment for the referee's on all questions including credibility. In other words, the court need not defer to the magistrate's findings. See 405 F. Supp. at 190-191. Nonetheless, the three-judge court upheld these statutory procedures, observing that it is not "constitutionally required that the * * * final arbiter of facts have personally heard the accused attorneys or other witnesses or have allowed oral argument upon the motions to confirm or disaffirm the referees' report." *Id.* at 195. This Court summarily affirmed.

of jury verdicts * * *." *Id.* at 486. See *Rogers* v. *Richmond*, 365 U.S. 534, 540-544 (1961).

c. There is also no substance to respondent's claim (Br. 52-53) that the procedure established by the Magistrate's Act is distinguishable from the manner of proceedings uniformly followed by administrative agencies. The magistrate, like an administrative law judge, conducts the evidentiary hearing and makes tentative findings of fact and recommendations of law. Then the district judge, like the agency or commission, makes a thorough review of the record and is thereafter free to "accept, reject, or modify in whole or in part, the findings of fact and recommendations of law. Then the district judge, like the agency or commission, undertakes a thorough review of the record and is thereafter free to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. 636(b)(1)(C). The Court long ago approved these kinds of fact-finding procedures (see *e.g.*, *Morgan* v. *United States*, 298 U.S. 468 (1936); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-497 (1951)), and there is no reason to reject their use in the pretrial, suppression motion context. Indeed, we further note that the Court routinely uses special masters in deciding cases falling within its original jurisdiction even though the master's reports and recommendations are "advisory only." R. Stern & E. Gressman, *Supreme Court Practice* 624 (5th ed. 1978).[10]

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[10]Respondent states (Br. 53) that "the courts have repeatedly refused to enforce agency orders" when there is no basis for the agency's determination of fact contrary to the finding of the administrative law judge. That observation is correct but irrelevant. Unless the issue is committed solely to agency discretion, the courts must reject any administrative finding that has no basis in fact, regardless of the administrative law judge's determination. Here, however, the district court's decision to deny respondent's motion is based on ample evidence, and the district court agreed with the magistrate.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA, PETITIONER

vs.

HERMAN RADDATZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AMICUS CURIAE OF THE CHICAGO COUNCIL OF LAWYERS.

GEORGE F. GALLAND, JR.
DAVIS MINER & BARNHILL
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170
Attorney for Amicus Curiae

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INTEREST OF THE AMICUS ON THIS APPEAL.

Amicus, the Chicago Council of Lawyers, was founded in 1969. It was born out of a widespread belief among many Chicago lawyers that the unsatisfactory condition of the state and federal benches in Chicago called for vigorous public efforts from the bar toward their improvement.[1] Candid public

1. The origins of the Council are explored in Powell, Anatomy of a Counter-Bar Association: The Chicago Council of Lawyers, 1979 American Bar Foundation Research Journal, pp. 501-541.

evaluation by Chicago bar groups of judges' performance was unheard of when the Council began. The Council promptly undertook such evaluations, and they have continued to be its central work. Those evaluations have drawn nationwide attention and praise.[2]

The Council's interest in this appeal arises from its activities to improve the personnel and procedures of the federal district court in Chicago. The Council has worked closely with United States Senators responsible for proposing nominations for judge. In 1972, the Council developed an unprecedented survey of lawyers, based on formal statistical methods, to evaluate local federal judges. In 1976, the Council repeated that survey, using more sophisticated statistical and surveying techniques, and it expanded the survey to evaluate magistrates as well as judges. See Chicago Council of Lawyers, Federal Judicial Survey: Results of a Survey of Lawyers Concerning the Performance of Judicial Officers in the United States District Court for the Northern District of Illinois (1976). This survey was repeated in 1979, with further improvements.

In the course of these activities, the Council has become particularly concerned with the federal magistrates of the district court in Chicago. The Council's 1976 survey evaluated the three then-sitting magistrates, at a time when they had far fewer responsibilities than they do now. Less than half the responding lawyers rated any of the three as qualified for advancement to district judge. The poorest rating was received by Magistrate Carl Sussman, who heard respondent Herman Raddatz's motion to suppress; only 22% of responding lawyers found him qualified

2. See, *e.g.*, Maddi, Judicial Performance Polls (American Bar Foundation 1977), pp. 24-25; *Congressional Record*, June 22, 1976, S. 1 (remarks of Senator Percy). The Senator called the Senate's attention "to the work that has been done by a relatively young but very influential and prestigious bar association [the Council] to provide those of us involved in the selection of Federal judges with valuable information about their performance on the bench. It is a contribution to the strengthening of the Nation's judicial system worthy of emulation."

for advancement to district judge. In 1979, with the consent of the district judges, the Council evaluated the "finalists" for a fourth magistrate's position and found the person ultimately selected, John W. Cooley, unqualified because of insufficient legal experience.

In view of this history, the Council has opposed the recent movement to allow judges to delegate significant powers to the magistrates. The Council submitted those views to Congress in the course of hearings in 1977 on expansion of magistrates' powers. See Hearings on Magistrates Reform Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st. Sess. (1977), p. 389. The Council does not oppose magistrates doing pretrial tasks that do not affect litigants' substantial rights. But to the extent magistrates are given the power to conduct proceedings that can dispose of cases, the Council frankly views that as disastrous. After years of work by many concerned legislators, citizens' groups and organizations like the Council, the caliber of the federal judges in Chicago has steadily improved and is now a credit to the federal judiciary. But there has been no such improvement, in the Council's view, as to the magistrates. This year, the district judges reappointed all three magistrates despite the Council's continuing criticism, and appointed a fourth deemed unqualified by the Council.

Because of these considerations, the Council regards the assignment to magistrates of hearings on motions to suppress, without the right to a *de novo* hearing before a judge, as a serious blow to the defense of criminal defendants. For the reasons that follow, the Council also believes that such assignment is unconstitutional.

SUMMARY OF ARGUMENT.

The Magistrates Act, as interpreted by the Government, permits the district judge to assign to a magistrate the evidentiary hearing on a motion to suppress, and to refuse the defendant's request to hold a *de novo* hearing even when the magistrate's recommended decision depended on the credibility of witnesses. This interpretation results in an unconstitutional classification that violates the equal protection guarantee of the Fifth Amendment.

Under the Government's interpretation of the Magistrates Act, the district judge is required personally to conduct any proceeding that can be dispositive of a case—except for the category of cases in which those accused or convicted of crime assert that their constitutional rights have been violated. In such cases, the statute allows the district judge to escape responsibility, by giving it to a magistrate, for performing the critical task, which in these cases is the hearing of live testimony. Because this classification is triggered by the attempt to claim specific constitutional rights, it can be justified under this Court's equal protection decisions only by a compelling governmental interest. No such interest exists here. In fact, the classification is without rational basis and fails even the loose standard of review used in equal protection cases that do not implicate the exercise of constitutional rights.

This is so for five reasons. First, the classification assigns to an inferior decision-making procedure precisely those rights that enjoy the highest stature under our law. Second, the classification assigns to inferior decision-makers a category of determination whose sensitive, controversial and potentially unpopular character calls for the most qualified available decision-maker rather than the least. Third, the classification inexplicably gives second-class treatment to criminal as compared to civil cases,

when due process demands the opposite result. Fourth, the classification irrationally assigns to lesser judicial officers that class of evidentiary rulings that has the greatest potential to dispose of litigation. Fifth, magistrates are a particularly inappropriate group to be deciding motions to suppress, because their preliminary duties in criminal cases accustom them to cooperate with, and acquiesce in, the *ex parte* requests of the very law enforcement officers whose credibility is at stake in motions to suppress.

No defensible reason justifies this classification, much less the compelling governmental interest required by this Court's equal protection cases. In particular, "saving the court's time" cannot justify the curtailment of procedures for determining criminal defendants' constitutional rights. Moreover, if district judges heed the Magistrate Act's requirement of a *"de novo* determination", the process will use more judge's time than it would take the judge to hold the hearing himself; yet, because the judge has not seen and heard the witnesses, it will lead to a less reliable result.

ARGUMENT.

IF INTERPRETED AS THE GOVERNMENT CONTENDS, § 28 U. S. C. § 636(b)(1)(B) WOULD DENY CRIMINAL DEFENDANTS THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AMENDMENT.

The Council concurs in the Seventh Circuit's due process analysis and in the arguments by respondent here for affirmance. Moreover, the Council believes that this Court must affirm for another reason not cited by the Seventh Circuit. If interpreted as the Government asks, the Magistrates Act would deny the equal protection of the laws to criminal defendants who assert their constitutional rights through motions whose resolution depends on the credibility of witnesses.

The Government takes the position that 28 U. S. C. § 636(b)(1)(B) authorizes a district judge to review a magistrate's recommended decision on a motion to suppress without hearing the witnesses *de novo*, even where the credibility of witnesses determines the magistrate's recommended decision. If so interpreted, § 636(b)(1)(B) would create a startling and utterly indefensible classification. Under this classification, all litigants except one group have the right to have the district judge personally conduct any proceeding whose outcome can force a final disposition of their case. The excepted group is those criminal defendants who assert, through a motion or petition that depends on the credibility of witnesses, that their constitutional rights have been violated. Because they are presumptuous enough to insist on the rights given them by the Constitution, they can be forced to have a magistrate conduct the crucial proceeding in the determination of those rights. The Council submits that this second-class judicial treatment of criminal

defendants' motions raising constitutional rights violates the Fifth Amendment.

A. Under the Magistrates Act, Only Criminal Defendants Asserting Their Constitutional Rights Can Be Forced to Submit to Magistrates for Potentially Dispositive Proceedings.

The unconstitutional classification created by the Government's interpretation of the Magistrates Act is clear on the face of the statute. Under 28 U. S. C. § 636, both before and after the recent 1979 amendments, a magistrate could not and cannot conduct the trial on the merits of a criminal or civil case without the consent of the parties—not even the tiniest federal misdemeanor or the most trivial fender-bender diversity suit.[1]. Hence, absent consent of the parties, the statute expressly precludes a magistrate from making any procedural or evidentiary ruling during trial that could dispose of the case or from being the finder of fact on the merits. At trial, a litigant cannot lose his case, or fail to win it, because of a magistrate's ruling—unless, of course, he has consented to trial by magistrate.

Likewise, *with three exceptions*, no litigant can lose his case, or lose a motion that would win it, because of the *pretrial or post-trial* ruling of a magistrate. Sections 636(b)(1)(A) and (B) closely confine the jurisdiction of magistrates on pretrial or post-trial rulings that can result in judgments or force immediate dismissal of the case. The Act lists eight such proceedings: (1) a motion for judgment on the pleadings; (2) a motion for summary judgment; (3) a motion to dismiss or quash a criminal indictment or information; (4) a motion to dismiss under F.R. Civ. P. 12(b)(6); (5) a motion to involuntarily dismiss

1. *Pre-1979 Amendments:* for criminal trials, see 28 U. S. C. A. § 636(a)(3) and 18 U. S. C. § 3401(b) (1979 Supp.); for civil trials, see 28 U. S. C. § 636(b)(2) (1979 Supp.).

As amended in 1979: for criminal trials, see § 636(a)(3) and 18 U. S. C. § 3401(b), 93 Stat. 646; for civil trials, see 28 U. S. C. § 636(c)(1), 93 Stat. 643.

an action; (6) a motion to suppress in a criminal case; (7) applications for post-trial relief by convicted criminals (mainly habeas corpus proceedings); and (8) "prisoner petitions challenging conditions of confinement."[2] As to the first five of these categories, there is no risk that a litigant can lose his case, or lose a motion that would win it, because of what the magistrate does. The reason is that these motions do not require evidentiary hearings. Hence, when the judge comes to make the "*de novo* determination" that is required by § 636(b)(1)(B), he will have everything before him that the magistrate had. A truly *de novo* determination can therefore take place.

But the final three categories—motions to supress, habeas petitions and "prison condition" petitions—are different. These categories nearly always require evidentiary hearings where credibility of witnesses is crucial. And because (if the Government is right) § 636(b)(1)(B) allows the judge to refuse to hear *de novo* the witnesses on such motions or petitions, a litigant in these three categories of proceeding can indeed lose his case, or lose a motion that would win it, because of what the magistrate does. Precisely that happened to respondent Herman Raddatz. A judge reviewing the magistrate's recommended decision is *not* compelled to have everything before him that the magistrate had. If he refuses to hold a new hearing, he will lack the decisive datum—live witnesses whose demeanor and credibility can be judged. In a situation like respondent's, where the magistrate resolved conflicting testimony with an express credibility determination against the defendant, it would be altogether extraordinary for a reviewing judge, who has seen and heard nothing, to reject the magistrate's recommendation.

2. § 636(b)(1)(A) also allows magistrates to make recommended decisions on pretrial motions for injunctive relief (*i.e.*, temporary restraining orders or preliminary injunctions) and on class certification decisions. Motions for class certification have nothing to do with the merits of the case. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 177-178 (1974); *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 466-468 (1978). Likewise, while a magistrate is allowed a recommendatory role as to preliminary injunctive relief, the trial on the merits must be held by the judge.

Thus, these three types of proceeding are the only ones in which, under the Act, a litigant can lose his entire case, or lose a motion that would win it, because of what the magistrate does. These proceedings are strikingly similar. All three involve persons accused of or already convicted of crime. And the purpose of all three proceedings is to ascertain whether such persons' constitutional rights have been violated. In these three cases, and only in these cases, can a judge divest himself of the responsibility of personally conducting a proceeding that can dispose of the case.

Being deprived of the opportunity to have a judge personally conduct these hearings constitutes a substantial setback for criminal defendants. No one regards magistrates as the equivalent of judges. As a class, they are inferior to judges in every respect. They do not have life tenure or constitutional protection against tampering with their salaries. They are paid less than judges. Their appointments have not been subjected, as judges' are, to intense scrutiny by the President and the Senate. The job carries little prestige; while federal district judgeships are avidly sought by distinguished lawyers, one is hard-pressed to think of a single well-known American lawyer who has become, or tried to become, a magistrate. For example, when the federal district court in Chicago invited applications for the new magistrate's position in 1979, it eventually chose, from among the finalists, a 36-year-old lawyer, John W. Cooley, who had been admitted to practice for only six years and who had practiced in court for only two. The Council intends no aspersion on Mr. Cooley's competence or performance. The only point made here is that if a lawyer of such limited background had been nominated for district judge, it would have provoked an uproar. (Incidentally, Mr. Cooley's qualifications at the time of appointment were impressive compared to those of another magistrate in Chicago, James T. Balog, who graduated from law school the year before

he became a magistrate. The district court reappointed him this year.)[3]

What is true in Chicago is true generally. In 1979 Congress acknowledged the relative inferiority of magistrates to judges when it amended the Magistrates Act. In this amendment, Congress reaffirmed that magistrates could conduct trials—no matter how simple and no matter how trivial the subject matter —only with the consent of all parties, and included extraordinary provisions designed to avoid pressure on the parties to give such consent. See 93 Stat. 643.[4]

This, then, is the classification created by the Magistrates Act as interpreted by the Government, among those judicial proceedings that can force the final disposition of cases. Only in a proceeding where a criminal defendant asserts his constitutional rights does the Act permit the judge to divest himself of the crucial judicial function involved in that proceeding and to delegate that function to an inferior level of judicial officer. As we now show, this classification violates the equal protection guarantee of the Fifth Amendment.

B. Under the Equal Protection Guarantee of the Fifth Amendment, the Classification Created by § 636 Is Unconstitutional.

The Fifth Amendment's due process guarantee includes a guarantee of equal protection of the laws. *Califano* v. *Goldfarb*, 430 U. S. 199, 203-205 (1977); *Weinberger* v. *Wiesenfeld*,

3. We have included, as an appendix to this brief, the current resumes of the four magistrates, which they themselves submitted to the Council.

4. Even the Attorney General conceded in 1977: "At present there is an unevenness in the ability of magistrates to perform their tasks. Many magistrates were appointed in 1971 when the magistracy was in its infancy and its tasks unclear." Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, *supra*, p. 27. Three of the four magistrates in Chicago, including the one who ruled on respondent's motion to suppress, fit the Attorney General's description.

420 U. S. 636, 638 (1975); *Schlesinger* v. *Ballard*, 419 U. S. 498, 500 (1975); *Jimenez* v. *Weinberger*, 417 U. S. 628, 637 (1974). Moreover, this Court has repeatedly held that when the challenged classification depends on the assertion of "a fundamental right explicitly or implicitly protected by the Constitution," it will be subjected to "strict judicial scrutiny." *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 17 (1973); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312-313 (1976); *Zablocki* v. *Redhail*, ... U. S. ....., 98 S. Ct. 673, 682 (1978); *Williams* v. *Rhodes*, 393 U. S. 23, 30-32 (1968); *Bullock* v. *Carter*, 405 U. S. 134, 142-144 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 634-635 (1969). In such cases, unless the classification is shown to serve a compelling government interest, and unless it is closely tailored to serve that interest, it is unconstitutional. See, *e.g.*, *Shapiro* v. *Thompson*, *supra*, 394 U. S. at 634; *Williams* v. *Rhodes*, *supra*, 393 U. S. at 31.

The classification created by the Magistrates Act must be judged under this standard. As we showed above, the classification at issue in this case hinges upon the assertion by persons accused or convicted of crime of rights explicitly guaranteed by the Constitution. These are the only persons under the Act who run the risk of having a dispositive proceeding conducted by a magistrate without the right to have it conducted again in its entirety by a judge.

This classification cannot be justified under the strict standard of review required by this Court's equal protection cases. In fact, it cannot be justified under *any* standard of review. For the following five reasons, it is wholly irrational to give magistrates the power to make a potentially dispositive determination in cases involving the fundamental Constitutional rights of persons accused of crime, while carefully preventing magistrates from making such determinations in all other categories of cases.

First, it is capricious to allow a judge to escape responsibility for conducting a potentially dispositive proceeding precisely in

those situations where the litigants' most precious rights are at stake. This classification assigns to the lowest level of federal judicial officer the crucial function in the determination of rights that rank at the top of our substantive legal hierarchy. Thus, in a diversity case for damages to his automobile, a defendant gets a judge to preside over every potentially dispositive proceeding in his case. A criminal defendant who requests a hearing to claim rights guaranteed him by the Founding Fathers gets a magistrate.

Second, the categories of proceeding entrusted to magistrates are those that in practice demand the *highest* caliber of judicial officer. Motions to suppress in criminal cases arguably expose judges to more public controversy and condemnation than does any other judicial function. Granting such motions can mean freeing a suspect who has clearly committed serious federal crimes. Such decisions demand the highest qualities of a judge—independence from the pressure of adverse publicity, freedom from insecurity about job tenure, the maturity and character to follow the law when the result may be personally repellant, and the ability to make decisive credibility determinations on the evidence in a situation where the temptation is to give routine credit to a law enforcement officer whose story conflicts with the defendant's. Nowhere in federal practice is there a more pressing need to have credibility disputes heard by the most qualified judicial officers available. Instead, under the Government's interpretation, Congress has allowed those disputes to be farmed out to the least.

Third, it is astonishing that the persons gettting the short end of the stick under this classification are precisely those accused of crime. Due process (which is the source of the equal protection right contained in the Fifth Amendment) is always interpreted more strictly in criminal cases than civil cases. Yet, under the Magistrates Act as interpreted by the Government, just the reverse situation prevails. To repeat our earlier example, a defendant in a fender-bender diversity suit has the right to have

every ruling on evidence made by a district judge, including the many evidentiary rulings that call for an *in limine* hearing of testimony. Yet a criminal defendant, who stands to go to jail depending on the ruling on his motion to suppress, can be compelled to submit to a magistrate. This is topsy-turvy. It is precisely in criminal cases where the case is strongest for requiring these proceedings to be held by the district judge.

Fourth, it makes no sense that in deciding which rulings on evidence can and cannot be made by magistrates, Congress has allowed to be delegated to inferior judicial officers precisely those rulings whose impact on a case is the most devastating. A motion to suppress evidence, after all, is only one kind of ruling among many on the admissibility of evidence at trial. Yet of all categories of evidentiary rulings, it is by far the most likely to force the immediate resolution of the case. This uniquely dispositive character of the motion to suppress has been formally recognized by requiring it to be heard in advance of trial. See F. R. Crim. P. 12(b)(3). One reason for this rule is, of course, that experience has shown that granting such a motion in the majority of cases leads to dismissing the case, making it unnecessary to prepare for trial or to empanel a jury. Thus is produced the strange and irrational state of affairs in which all evidentiary rulings on the admissibility of evidence at trial must be made solely by the district judge—except for the most important and decisive category, in which the critical proceeding is conducted by a magistrate.

Fifth, there are strong reasons to believe that magistrates are a particularly inappropriate group to be entrusted with this category of credibility determination, which always boils down to the word of a law enforcement officer against that of a criminal defendant. Much of a magistrate's time is taken up by the issuance of orders at the *ex parte* request of law enforcement officers, such as issuing arrest warrants (F. R. Crim. P. 4(c)(1)) and issuing search warrants (F. R. Crim. P. 41). Another important magistrate's task is the holding of preliminary hear-

ings, which often consist solely of law enforcement officers' testimony and which, in the overwhelming majority of cases result in a "probable cause" finding, since illegally seized evidence may be used at such hearings. F. R. Crim. P. 5, 5.1(a). Such duties are likely to bring FBI agents and other law enforcement officers before the magistrate on a regular, *ex parte* and friendly basis. That is poor training, to say the least, for the task a magistrate faces on motions to suppress. There he may be required to find that the very officer who routinely appears before him and who is routinely granted arrest warrants, search warrants or "probable cause" findings is lying under oath.

As against all these irrational aspects of the classification set up by the Magistrates Act, there is absolutely no constitutionally sufficient justification for it, much less the compelling one that is required. The only possible defense of this procedure is that refusing to hold a *de novo* hearing on these three categories of proceeding might save the district judge some time. This defense fails for three reasons.

First, "saving the judge's time" is simply not a sufficiently compelling governmental interest to justify discriminatory treatment of a criminal defendant's attempt to vindicate his constitutional rights. No decision of this Court has ever countenanced such treatment in the name of saving time. Instead, such "convenience" rationales have been consistently rejected as a justification of classifications that hinge on the attempt to exercise constitutional rights. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 268-269 (1974); *Shapiro* v. *Thompson*, *supra*, 394 U. S. at 643-635; *Zablocki* v. *Redhail*, *supra*, ... U. S. ....., 98 S. Ct. at 682-683.

Second, the "timesaver" rationale does not satisfactorily explain why Congress has singled out these three categories of criminal cases in which to deny the right to absolutely full review by district judges of magistrates' decisions. If Congress, in the interest of saving judges' time, is to be allowed to exempt

certain kinds of dispositive proceedings from the requirement of total review by the district judge, its choice must at least bear some relation to what is at stake in the particular proceedings it chooses. One could perhaps see such a relation, for example, if Congress had decided to let magistrates try auto accident diversity cases, subject to "*de novo* review" by the judge without a mandatory *de novo* hearing. In such a case, Congress at least could not be accused of entrusting truly important federal rights to a magistrate's determination.

Without such a requirement—that Congress's choice of proceedings on which to save judges' time bear some reasonable relation to the relative importance of the rights at stake in those proceedings—there is no limit to the damage that the "timesaver" rationale can do. If "saving judges' time", by itself, is a sufficient justification for turning certain tasks over to a magistrate, then there could be no equal protection bar to Congress turning over precisely the most important functions in the most important kinds of federal constitutional cases to magistrates. It would save plenty of judge's time, for example, for Congress to decree that all challenges to abortion statutes, or all litigation arising out of the imposition of the death penalty, should be decided by magistrates. Yet it is clear that that would violate equal protection.

In short, "saving judges' time" begs the question as a rationale for a judge/magistrate classification, for it could justify *any* such classification. Even under a "rational basis" test of equal protection, the question must be: is there any decent reason for singling out the assertion of precious constitutional rights as the category for saving judges' time? As we showed earlier, there is none.

Third, it does *not* save judges' time to delegate the hearing on the motion to suppress to magistrates. This is so for two reasons.

First, it is in the nature of criminal practice that virtually every time a defendant loses a motion to suppress before a

magistrate, he will demand review by the district judge. A criminal lawyer who fails to seek such review risks being accused of providing inadequate representation. So this referral is unlikely to relieve district judges from the ultimate decision-making responsibility in any significant number of cases.

Second, the strict reviewing responsibilities imposed on the district judge by 28 U. S. C. § 636(b)(1) are almost bound to take up more of the judge's time than it would have taken had he held the hearing himself. He must make a *"de novo* determination" of every part of the magistrate's report to which objection is taken. In the case of a motion to suppress, this requires the district judge to read, personally, the entire transcript of the suppression proceedings. Under this standard, he cannot rely on his law clerk to read the transcript and advise him whether the magistrate's recommended ruling makes sense, any more than he could have assigned his law clerk to conduct a hearing on the motion to suppress. And every lawyer who has had to review a transcript of a hearing at which he was not present knows how difficult it is to make sense of what was happening, to compare the testimony of different people on the same point, and to evaluate the significance of variations or contradictions. Yet the judge not only has to do that, but also has to form his own determinations from scratch, for the statute specifically precludes him from giving any presumptive weight to the magistrate's conclusions.

No judge can conscientiously follow these strictures without spending at least as much time as it would have taken to hold the hearing himself. And in the end, it is indisputable that the judge's decision, if truly made *de novo,* is less likely to be correct than if he had heard the witnesses himself. The result of this procedure, therefore, is no saving of time whatsoever but a less reliable result—the worst of both worlds.[5] At best, the

5. Under these circumstances, what is inevitably going to happen is that some judges will *not* conscientiously follow the statute. They *will* delegate the reading of the transcript to their law clerks and

(Footnote continued on next page.)

"potential for significantly conserving the resources of either the litigants or the judiciary is doubtful at best." *Parkland Hosiery Co.* v. *Shore,* ..... U. S. ....., 99 S. Ct. 645, 664 (1979) (Rehnquist, J., dissenting).

To sum up: the classification which, under the Government's interpretation, has been created by the Magistrates Act deprives criminal defendants who assert their constitutional rights on motions to suppress or post-conviction proceedings of the equal protection of the laws. There is no compelling governmental reason for allowing judges to escape, in this unique category of cases, the responsibility for personally conducting proceedings that can dispose of the case. Nor is there even a rational basis for such a classification. Every defendant who, like Herman Raddatz, is denied a *de novo* hearing by the district judge on a motion to suppress that depends on the credibility of witnesses has been denied the protection of the Fifth Amendment.

A final word is appropriate. The vigorous debate that the exclusionary rule has created among the public, and within this Court, is well-known. In the face of this debate, this Court has continued to reaffirm that all criminal defendants have the right under the Constitution to have illegally-seized evidence or illegally-obtained confessions barred from their trials. See, *e.g., Ybarra* v. *Illinois,* ..... U. S. ..... (November 28, 1979). This is not a popular right, and its unpopularity is reflected in the apparent attempt by Congress to allow judges to divest themselves of the hardest task that has to be done when defendants claim it. Yet it is precisely because the right asserted on motions to suppress is a controversial and politically unpopular right that the farming out to magistrates of the hearings on these motions is so indefensible. Defendants like re-

(Footnote continued from preceding page.)

they *will* give presumptive weight to the magistrate's ruling. And there will be no way for a criminal defendant to redress such shortcuts or to prove that they occurred. This inevitable curtailing of defendants' rights cannot occur if the judge hears the testimony on the motion.

spondent must be given the same first-class treatment of their efforts to claim that right that other litigants are guaranteed on rights that have no constitutional standing whatsoever.

CONCLUSION.

The decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

GEORGE F. GALLAND, JR.
DAVIS MINER & BARNHILL
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170
Attorney for Amicus Curiae

APPENDIX.

RESUME OF JOHN W. COOLEY

Personal Data

Name: John W. Cooley

Nickname: Jack

Address: 2646 Eastwood Avenue, Evanston, Illinois 60201

Telephone: Home: 328-7234;
Office: 435-5805

Date of Birth: October 28, 1943 Place of Birth: St. Louis, Mo.

Marital Status: Married, two children (boy, age 8; girl, age 4)

Military Status: Served on active duty for 4 years and 9 months. Honorably discharged February 26, 1970; resigned commission in the rank of Captain.

States in Which Licensed to Pratice Law:
Illinois and Missouri

Professional Organization Membership and Offices
American Bar Association

Secretary of the National Committee of Appellate Staff Counsel, Appellate Judges Conference, Judicial Administration Division of the A. B. A.

Chicago Bar Association

Other Affiliation:

Member of Board of Directors West Point Society of Chicago
Treasurer, Citizens' Zoning Committee of Evanston

Second Language:

Spanish

Travel Experience:

Visited practically every major city in the United States (covering 44 States and including Alaska and Hawaii). Studied law in London, England for one year. Spent time in many other European capitals including Paris, Madrid, Rome, Brussels, Zurich, and Berlin. Served one year in Vietnam; visited Guam and Japan.

Education

Law School:

Notre Dame Law School
J. D. May, 1973
Academic:

(1) Lead Articles Editor, Notre Dame Law Review

(2) Published two articles: 47 *N. D. Lawyer* 392, concerning the inheritance rights of illegitimate children; 48 *N. D. Lawyer* 936 regarding a proposal for trial delay indemnity. I also co-authored an article which was published in the *Insurance Law Journal* in 1973, concerning the legal liability of insurance company directors.

(3) Studied comparative and international law for a year in London, England.

Leadership and Activities:

(1) Executive Vice President, Student Bar Association

(2) Chairman, Law School Housing Committee

(3) Staff writer, law school newspaper

(4) Planner and participant in pilot program experimenting with the use of video tape in practice court to serve as the record on appeal in later moot court competition.

Undergraduate:

United States Military Academy, West Point

B. S. in Engineering, June 1965
Academic-Leadership-Activities:

(1) As the top graduating senior of my high school class, (Christian Brothers' College High School, St. Louis, Missouri, 1961), I turned down two 4-year scholarships to enter West Point. I maintained a Dean's List average during much of the time I attended the Academy.

(2) During my senior year, I was summer training company commander, and later a regular-lettered company commander. I served as an elected member of the Cadet Honor Committee for three years.

(3) During all four years at the academy I participated in the West Point Glee Club and the Dialectic Society. In my fourth year I composed the musical score for the Academy's annual musical comedy stage production, for which I received a personal letter of commendation from the Superintendent of West Point. Sportswise, I participated in company boxing, soccer, baseball, and tennis.

Employment

Legal Employment

(1) *January, 1977 to Present: Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit.* As Senior Staff Attorney I am responsible to the Circuit Judges and the Circuit Executive. My duties include, but are not limited to: assisting the Circuit Executive in supervising staff attorneys (staff law clerks) and court secretaries; screening all civil notices of appeal for the purpose of detecting jurisdictional and other defects and of selecting cases for predocketing conferences; scheduling and conducting docketing conferences with counsel in all criminal appeals and predocketing (settlement) conferences in selected civil appeals; researching complex issues of law which may arise from a particular motion; drafting

proposed opinions or orders in the more complex cases submitted without oral argument; acting as a public relations officers for the court and providing procedural information to counsel and general information to public and private groups regarding the federal court system; acting as a liaison officer between the court of appeals and the district court clerks and court reporters within the circuit; assisting the Circuit Executive in initiating, planning, and conducting studies, suveys, and experiments to determine effective methods of reducing court caseload and judicial and administrative workload and of streamlining the appellate process; assisting the Circuit Excutive in collecting, compiling, and analyzing statistical and other data with a view to the presentation of the reports based on such data as may be directed by the Chief Judge, the Circuit Executive, and the Administrative Office of the United States Courts; assisting the Circuit Executive in setting the court calendar and in assignment of panels of judges; serving as a member of the Advisory Committee on Circuit Rules.

(2) *August, 1974 to January, 1977: Assistant United States Attorney, Northern District of Illinois, Chicago.*

(a) *August, 1974—January, 1975: assigned to Appellate Division;* drafted and ultimately argued approximately ten briefs in the United States Court of Appeals for the Seventh Circuit. These briefs addressed issues relating to both civil and criminal law, including federal removal jurisdiction, extortion as a defense to bribery in a Travel Act prosecution, selective prosecution, admissibility of computer printout tax records under government records exception to the hearsay rule, speedy trial, conspiracy, prior and subsequent similar conduct, propriety of various jury instructions. During this time I attended a two week trial advocacy course conducted by the United States Department of Justice in Washington, D. C..

(b) *February, 1975—August, 1975: assigned to Criminal Receiving and Appellate Division;* continued drafting and arguing appellate briefs; handled a multitude of criminal matters in the magistrate courts; tried five criminal cases, (two narcotics cases; two counterfeiting cases; one theft from interstate shipment), in the federal district court; handled numerous other matters in the federal district court including arraignment and plea and sentencing hearings, mental competency hearings, parole and probation revocation hearings, and *Brady* and newly discovered evidence hearings.

(c) *August, 1975 to January, 1977: assigned to Civil Division* of the United States Attorney's Office, and carried a caseload of sixty cases, on the average. These included tort cases (e.g. medical malpractice, trespass in connection with HUD foreclosure, improper weapons screening of carry-on luggage by airlines, alleged negligence of O'Hare air traffic controllers); Civil rights cases (e.g. HUD housing regulations, HEW regulations regarding secondary school female athletic programs, alleged conspiracy by FBI and CIA to violate individual rights, alleged conspiracy by the U. S. Postal Service to violate employment rights; class actions against INS officers regarding their right to stop and interrogate aliens.); Immigration and Naturalization cases; Vehicle Forfeiture cases; multi and single family HUD mortgage foreclosure actions; bankruptcy cases; IRS tax lien assessments and foreclosures; contract disputes; Social Security disability and black lung cases; labor cases; civil fraud cases. I received the Department of Justice's Special Achievement Award on December 13, 1976.

(3) *September, 1973 to August, 1974: Law Clerk to the Honorable Roger Kiley, United States Court of Appeals for the Seventh Circuit.* A portion of my time was devoted to Staff Law Clerk duties involving the review, researching, and presentation for decision of various motions to the

active judges on the Court. During this time I supervised the preparation of the first Manual for Staff Law Clerks, consisting of approximately 200 pages of instructions, checklists, and sampe motions and orders.

(4) *Legal Employment During Law School (1972-73 School Year: Law Clerk, Insurance Section of the Associates Finance Corporation's Legal Department, South Bend, Indiana.* My chief function was to review recently enacted state insurance legislation to determine its impact on company operations and then prepare memoranda for dispatch to the affected branches. Additionally, I was required to review claims on disability policies where there was a suspicion of pre-existing physical or mental conditions. Finally, I conducted several legislative surveys related to state rules on cancellation, suspension, and renewals of automobile insurance policies.

Non-Legal Employment:

Assistant Manager of Hotel:

For a period of six months subsequent to my release from active duty and prior to my commencing law school, I served as the assistant to the General Manager and Sales Representative of a 200-room hotel in South Bend, Indiana. Generally the job consisted of supervising the operation of the front desk, dining room, coffee shop, bar, and maintenance department. I had full responsibility for the preparing for conventions and the handling of reservations. In addition, I acted as sales representative for the hotel, meeting with many directors of major concerns in the area to promote business.

Military Experience:

(1) Military Schooling:

Attended Airborne and Ranger Schools at Fort Benning, Georgia graduating in December of 1965; Missile Officer Basic Course, August, 1965, Vietnam Orientation Course,

September, 1967; Computer Programing Methods, June, 1969.

(2) Leadership:

(a) *Missile Platoon Leader:* involved the supervision, control, and training of approximately 35 individuals and the direct responsibility for several million dollars worth of government property, including the security and maintenance of sensitive nuclear warheads.

(b) *Battery Commander:* entailed the supervision, control, and training of approximately 130 individuals. As a missile battery commander in the United States, I had the direct responsibility for providing round-the-clock air defense protection for the St. Louis area. In 1966, the battery which I commanded achieved an exceptionally high performance rating during actual missile firings at White Sands, New Mexico. As a 175mm artillery battery commander in Vietnam, I was responsible for providing defense, offensive, and harassing fires in the area of the Demilitarized Zone. My battery was influential in suppressing the North Vietnamese advance on Khe Sahn during the 1968 Tet Offensive.

(3) Administration and Management:

Adjutant: As a battalion adjutant in Vietnam, I was the administrative and personnel chief of a field artillery unit consisting of over 600 men. Among the duties discharged in this position were: drafting of all official correspondence for the commander, conducting assignment interviews, coordinating the commander's activities, and handling all correspondence and coordination in conjunction with courts-martial. As a group adjutant in the United States, I served in the capacity of administrative and personnel chief of an air defense artillery unit consisting of more than 700 men. Among the duties performed in this position were: acting as the personal representative of the

commander in his absence, interviewing candidates for prospective job assignments, organizing and coordinating non-commissioned officer promotion boards, editing a unit newspaper, serving as a member of the tribunal in courts-martial, and acting as a consultant in any matters pertaining to the health, morale, or welfare of the unit's members. In addition, I organized, and together with the commander, conducted two Operation Understanding tours to Ft. Bliss, Texas and to the Headquarters of the Army Air Defense Command in Colorado Springs. The purpose of this program was to acquaint prominent St. Louis officials and businessmen with the operation of the Army Air Defense Command.

(4) Coordination:

Air Observer, Vietnam: involved the delicate and difficult task of coordinating and directing field artillery fires, jet air strikes, and naval gunfires on suspected and verified targets within the Demilitarized Zone and within the close vicinity of friendly troop dispositions.

(5) Academic:

Nuclear Weapons Instructor: entailed the preparation and presentation of instruction regarding nuclear weapons characteristics, methods of employment, and target analysis to career course officers. I had the rare distinction of being designated a Level I instructor upon completion of the instructor training course, a prerequisite to the teaching position. This duty assignment required a top secret security clearance.

(6) Recognition:

Decorations: Bronze Star Medal, Air Medal, Two Army Commendation Medals.

References

The Honorable Thomas E. Fairchild

United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

The Honorable Luther M. Swygert
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Mr. Collins T. Fitzpatrick
Circuit Executive
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Mr. Thomas F. Strubbe
Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

JAMES T. BALOG

James T. Balog was born in Watertown, South Dakota, May 12, 1932. He presently resides at 1555 North Dearborn Parkway, Chicago, Illinois, 60610, and is married to the former Nancy McDonnell.

BBA from the University of Michigan, 1954.

JD from the John Marshall Law School, 1970.

He was appoined a United States Magistrate on March 12, 1971.

His previous employment was that of United States Commissioner, 1967-71; Deputy Clerk, U. S. District Court, 1962-67;

Private Industry, 1954-62 (including time in the United States Air Force as a jet fighter pilot, 1955-57).

He was the President of the Chicago Chapter of the Federal Bar Association (1978-1979), currently a member of that assoc., and the Bar Association of the Seventh Federal Circuit; a past President of the University of Michigan Club of Chicago (1972-1973); first President of the Village of Carol Stream, Illinois (1959-1962).

He has participated as a faculty member of the Federal Judicial Center at seminars for newly appointed Magistrates—Indianapolis, Indiana and Rapid City, South Dakota in 1972; Atlanta, Georgia in 1973; and Washington, D. C. in 1975.
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CARL B. SUSSMAN

Biographical Sketch

Professional and Bar Association Activities

Carl B. Sussman was appointed United States Magistrate for the United States District Court, Northern District of Illinois, on March 12, 1971. Prior to that time he was engaged in the private practice of law. He was a member of the Board of Managers of the Chicago Bar Association (1964-1966), and is a past Chairman of the Association Meetings Committee. He has served on approximately 20 Bar Association committees, including Grievance, Candidates, Judiciary, Inquiry, and Juvenile Delinquency.

Posts of Honor and Public or Quasi-Public Offices

Sussman served as a member of the Illinois Parole and Pardon Board to which he was first appointed in 1965 and reappointed in 1967. During that same period he also served as a member of the American Correctional Association and the Association of Paroling Authorities. Also, in 1965, he was appointed a member of the Board of Directors of the House of Correction of the City of Chicago, and on January 1, 1970, was appointed

a Director of the Cook County Department of Corrections where he served until his appointment as United States Magistrate.

Education

Sussman graduated from Chicago-Kent College of Law, a division of the Illinois Institute of Technology in February 1937, awarded the Degree of J.D., and was admitted to the Illinois Bar on April 15, 1937.

Awards and Publications

In 1950 Sussman received the Distinguished Service Award from the Decalogue Society of Lawyers and served as its President in 1951. In 1962 he received the Certificate of Appreciation for 20 years of service to the nation from President John F. Kennedy. In 1974 the Chicago Bar Association awarded him its Certificate of Appreciation for service to the Organized Bar and the Association as Chairman of the Association Meetings Committee. He is the author of a number of legal articles published by the Chicago Bar Association and the Decalogue Society, and has lectured before legal groups.

On November 21, 1978, Sussman participated in a Federal Practice Seminar at the Chicago Bar Association with panelists that included Judge Prentice H. Marshall of the U. S. District Court, Judge Wm. J. Bauer of the U. S. Court of Appeals, and H. Stuart Cunningham, Clerk of the U. S. District Court. On June 15, 1979, the Chicago Bar Association presented him with its Certificate of Appreciation for his contribution in improving Bench and Bar relations.

OLGA JURCO

Biographical Information

Name:

Olga Jurco, United States Magistrate, Northern District of Illinois 2402 Dirksen Building, 219 South Dearborn, Chicago, Illinois 60604—435-5638.

Education:

De Paul University, College of Commerce, B. S., College of Law J. D.

Law Experience:

General law practice after admission; Senior Law Clerk to Judge Walter La Buy, U. S. District Court 1944 until his retirement; Senior Law Clerk to Judge Richard B. Austin, U. S. District Court, September 1961 to March 1971. Appointed U. S. Magistrate for Northern District of Illinois March 12, 1971.

Membership in Professional Societies:

Federal Bar Asociation, Chicago Chapter

Women's Bar Association of Illinois

Chicago Bar Association

Illinois State Bar Association

Bar Association, Seventh Federal Circuit

American Judicature Society

Kappa Beta Pi Legal Sorority

Publications:

Chicago Bar Record, February 1973, "The United States Magistrate—A Transition Period."

Special Appointments:

Appointed July 1975 by Chief Judge Parsons as the United States Magistrate member of the Northern District of Illinois Court's Planning Group (Commission) on the Speedy Trial Act of 1974; Chairman of its Sub-Group on Systems and Procedures.

Awards:

Milton Gordon Award from Chicago Chapter, Federal Bar Association, June 1973 "for excellence and merit among government lawyers at the staff level."

Panel Member at Judicial Center Seminars:

Seminar for U. S. Magistrates, Title VII, Equal Employment Opportunity, Denver, Colorado, November 1973.

Seminar for U. S. Magistrates, Dispositive Motions and Report Writing, Atlanta, Georgia, April 1977; San Francisco, California, June 1977; Chicago, Illinois, September 1977.

Seminar for Chief Probation Clerks, Relationship between Probation Office and U. S. Magistrate, Chicago, Illinois, July 1974.

Seminar for Pretrial Service Officers, Relationship between Pretrial Service Office and U. S. Magistrate, Cincinnati, Ohio, July 1978.

Public Appearances as U. S. Magistrate:

American Bar Association, Law Student Division, April 1976.

Federal Bar Association, Chicago Chapter, June 1972.

Women's Bar Association of Illinois, October 1973.

John Marshall Law School Class for Advanced Federal Practice and Procedure, March 1973.

Military Law Committee of the Chicago Bar Association regarding Magistrate Court at Military Bases, December 1977.

Immigration and Naturalization Service, National Anti-Smuggling Program Seminar, January 1978.